(1) Supreme Court, U.S.
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No. 00-

IN THE
Supreme Court of the United States

ALFRED A. PORRO, JR.
AND
JOAN A. PORRO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals violated the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment when, contrary to the rationale of *Jones* v. *United States*, 526 U.S. 227 (1999) and *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), it affirmed terms of imprisonment for petitioners that exceeded the maximum under the Sentencing Guidelines authorized by the jury's findings.

2. Whether the court of appeals violated petitioners' Sixth Amendment rights to compulsory process and fair trial in affirming the district court's decision to exclude, as a discovery sanction, petitioners' defense experts without a finding of willful misconduct, without assessing the probative value of the excluded testimony, without consideration of whether the prosecution would be prejudiced in any way and without consideration of lesser sanctions.

3. Whether the court of appeals violated the Due Process Clause of the Fifth Amendment in holding that petitioners' claims of sentencing errors were waived, despite petitioners having properly and timely raised such claims in their appeal, merely because the court of appeals deemed those arguments insufficiently articulate.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Alfred A. Porro, Jr. and Joan Atkins Porro, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit issued an unpublished opinion and judgment on August 22, 2000. This opinion appears at App. 1a-23a. The orders denying the petitions for rehearing were entered on October 25, 2000 and appear at App. 44a-47a. The district court's judgments of conviction, dated October 14, 1999, appear at App. 26a-43a.

JURISDICTION

The court of appeals entered judgment on August 22, 2000. Petitioners timely filed motions for rehearing on the decision of the court of appeals, which were denied on October 25, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor be deprived of life, liberty, or property, without due process of law

U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; ... [and] to have compulsory process for obtaining witnesses in his favor

U.S. Const. amend. VI.

STATEMENT OF THE CASE

The first issue presented by this petition is whether the imposition of a prison sentence that substantially exceeds the maximum term of imprisonment under the Sentencing Guidelines authorized by the jury's findings infringes upon the accused's due process rights guaranteed by the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment. The trial court determined petitioners' sentences based upon facts concerning pecuniary losses, including losses associated with conduct unrelated to the activities alleged in the indictment, and aggravating circumstances. None of these facts were ever alleged in the indictment or proven to a jury beyond a reasonable doubt. Petitioners were sentenced for conduct and circumstances based solely upon the trial court's findings at sentencing by a preponderance of the evidence. Consistent with this Court's decisions in *Jones* v. *United States*, 526 U.S. 227 (1999) and *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), petitioners' sentences should be vacated and remanded to the court of appeals for reconsideration based only upon the allegations decided by the jury.

The second issue is whether the court of appeals erred in upholding the district court's decision to exclude petitioners' expert testimony as a sanction for discovery violations without finding that: (1) the defense engaged in willful misconduct; (2) the excluded testimony would not be helpful

to the defense, (3) the prosecution would be unfairly prejudiced; and (4) no less severe alternatives were available. The court of appeals held that that the district court did not abuse its discretion when it concluded that "preclusion of the Porros' expert witnesses was necessary to prevent undue prejudice to the prosecution." App. 21a. In its cursory analysis of the issue, the court of appeals made no attempt to balance petitioners' right to present evidence in their defense against countervailing public interests, such as the integrity of the trial process. In fact, the court of appeals did not even directly address how the prosecution was specifically prejudiced. The court of appeals' decision in this regard directly conflicts with the principles established in this Court's decision in *Taylor* v. *Illinois*, 484 U.S. 400 (1988), as well as those circuit court decisions that have interpreted *Taylor* to stand for the proposition that the exclusion of witnesses who would be helpful to the defense is permissible only if the violation of the discovery order was willful and done in order to gain tactical advantage. A split exists in the circuit courts of appeals over whether or not probative defense evidence may be properly excluded in a criminal proceeding for discovery violations if those violations were not found to be deliberate or in bad faith. This case squarely presents the question that engendered the split and warrants review.

The third issue is whether the Third Circuit erred in affirming petitioners' sentences on the ground that petitioners' challenges to discrete sentencing errors had been waived because petitioners legal argument was arbitrarily deemed insufficiently articulate. The court of appeals recognized that petitioners, in their appeal, maintained that the district court committed "no less than six separate errors" with respect to their sentences, none of which were declared frivolous. App. 22a. The court, however, refused to address any of the alleged errors on the merits. Instead, the court made its own subjective determination that petitioners'

arguments did not meet an unspecified standard for clarity sufficient to warrant review. However inartful petitioners' arguments may have been, there is no basis in law for the court of appeals to deem them waived based solely on the court's subjective view of the quality of petitioners' legal writing, especially where the issues deemed waived are all objections to the period of time petitioners will be denied their fundamental right to liberty. The court's attempt to set an arbitrary standard well beyond the minimum requirements necessary to adequately raise an issue on appeal should be reversed and the case remanded for consideration of petitioners' claims on the merits.

A. Factual Background

Petitioners are husband and wife. Both practiced law in Lyndhurst, New Jersey, representing private clients and municipal governments for 40 years and 20 years respectively. As Alfred Porro's legal practice developed in the 1960's and 1970's, he rose to national prominence as a respected expert on coastal zone law and riparian rights.[1] In addition to maintaining a private practice, Alfred Porro taught at seventeen academic institutions, including as a full Professor at the University of Baltimore Law School. Joan Porro focused her legal practice primarily on sewerage authority law, zoning, and municipal government. Petitioners were active members in their community, co-founding and maintaining the Bergen County Legal Services for the poor. For nearly 40 years, Alfred Porro also served in a variety of capacities for Congressman Henry Helstoski, former mayor of East Rutherford, New Jersey, including campaign manager, general counsel and personal attorney.

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[1] This Court has cited Mr. Porro's legal writing. *See Phillips Petroleum Company* v. *Mississippi & Saga Petroleum U.S., Inc.*, 484 U.S. 469, 493 (1987) (O'Connor, J. dissenting) (quoting Porro & Teleky, *Marshland Tidal Dilemma: A Tidal Phenomenon*, 3 Seton Hall L. Rev. 323, 325-26 (1972)).

In the 1970's, Alfred Porro became embroiled in contentious litigation involving the United States Attorney's Office for the District of New Jersey through his representation of Henry Helstoski. In 1975, Alfred Porro was named in an indictment charging Mr. Helstoski in an immigration-related matter, but was ultimately cleared of any wrong-doing. In 1977, the Third Circuit reversed a district court's dismissal of an action Alfred Porro had brought on behalf of Henry Helstoski alleging that the United States Attorney was engaged in a systematic effort to discredit Mr. Helstoski to destroy his political career. See *Helstoski* v. *Goldstein*, 552 F.2d 564, 565-66 (3d Cir. 1977) (refusing to extend prosecutorial immunity for conduct beyond the proper performance of administrative and investigative functions).

Following the Helstoski litigation, throughout the 1980's and early 1990's, the United States Attorney's Office specifically targeted Alfred Porro. As a result of this extensive investigation, the United States Attorney's Office concluded sometime in 1993 that Alfred Porro had submitted false statements, including overstating his net worth, on loan applications to three banks to maintain a revolving line of credit for his law practice and to finance his business and real estate investments. The investigation also raised questions with respect to Joan Porro's investment of trust funds into businesses in which Alfred Porro held an interest.

The trust funds at issue originated with Richard Galofaro, a friend and client of Joan Porro, who passed away in 1986. In accordance with Mr. Galofaro's will, his assets were placed into two trusts (the "Trusts") for his two sons, possession and control of which were transferred to Joan Porro. As trustee, Joan Porro had full authority and discretion to invest funds as she saw fit for the benefit of Mr. Galofaro's sons. Although not required under the Trusts, in the exercise of her oversight, Joan Porro provided Mr. Galofaro's former spouse with information about the Trusts every February for tax purposes. In 1989, Joan Porro invested $88,000 from each of the Trusts

into Riverview Associates, a real estate development company in which Alfred Porro held a limited partnership interest. Joan Porro disclosed the investment to Mr. Galofaro's former spouse, and in subsequent years indicated on statements that the investment was accruing annual interest. In 1991, Joan Porro invested an additional $50,000 from each of the Trusts into L.T./A.P. Enterprises, Inc., an entity owned by Alfred Porro and Lawrence Taylor, a former star linebacker for the National Football League's New York Giants. L.T./A.P. Enterprises was incorporated to construct and finance a golf center in New Jersey. Joan Porro informed Mr. Galofaro's former spouse of this investment in February 1995, but did not disclose Alfred Porro's limited partnership interest.

The investment of funds from the Trusts were governed under two agreements between Joan Porro and Alfred Porro. Under these agreements, Joan Porro had the option of either liquidating the investments, at which point all accrued interest would be due in full, or of taking an equity position in the assets of the businesses. Joan Porro elected to liquidate the investments in 1995, resulting in a return for the Trusts of the full initial investment of $276,000, plus substantial earnings.

In May and June 1994, petitioners received subpoenas from a grand jury investigating allegations that petitioners had misappropriated trust funds. On January 4, 1995, government agents searched petitioners' home and law offices, resulting in the seizure of files related to petitioners' legal practice, and importantly, all of the files petitioners had created in preparation for their defense of an anticipated indictment against them. Petitioners had labeled several of these files very plainly "Grand Jury Investigation" files. Such files contained communications with defense counsel, legal

research, trial strategy charts, and details of the testimony of potential witnesses and exculpatory evidence.[2]

On July 26, 1996 a federal grand jury returned a sealed, 4-count indictment against petitioners. Counts 1 through 3 alleged that petitioners committed mail fraud on three occasions as part of a scheme to use $276,000 in trust funds for their own benefit. The alleged mail fraud stemmed from the mailing of three letters by Joan Porro in February 1992, 1993 and 1994 to Mr. Galofaro's former spouse that provided tax information concerning the Trusts. The fourth and most serious charge, money laundering, alleged that in 1991, prior to committing mail fraud, the Porros "engage[d] in a monetary transaction in criminally derived property" (App. 52a) when they used the $100,000 investment out of the Trusts into L.T./A.P. Enterprises to pay a general contractor for the golf center development. According to the indictment, the predicate act for the money laundering count was purportedly the subsequent mail fraud.

This original indictment was superseded on December 13, 1996 by a sealed, 17-count indictment, and again on July 11, 1997 by a 19-count indictment. In addition to the four original charges, Count 5 of the final indictment alleged that petitioners conspired to obstruct justice. Counts 6 through 14 charged Alfred Porro with false statements on loan applications to three banks. The indictment did not allege that any loss occurred under Counts 1 through 14. Joan Porro was alleged to have committed tax evasion in Count 15 for

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[2] When the Assistant United States Attorney reviewed these files he "realized there was a problem" and made arrangements to have a second Assistant United States Attorney in the same office assist with segregating privileged communications. App. 4a. Ultimately, on March 4, 1998, despite petitioners' repeated attempts to have their privileged legal files returned to them, the district court ruled that petitioners' attorney-client privilege had been waived by the passage of time and lack of a proper response to the prosecution's invitation to review the documents at the prosecutor's office.

failure to pay an outstanding tax balance of $14,625 for the calendar year 1989. Counts 16 through 18 charged petitioners with false subscription to personal income tax returns for 1990, 1991, and 1992 for failure to report income, including the money invested out of the Trusts. Joan Porro was alleged to have committed false subscription to a partnership income tax return filed for 1990 in Count 19. As with Counts 1 through 14, the indictment did not allege any loss under Counts 16 through 19.

B. Proceedings Below

Petitioners defended the charges contained in the 19 count indictment *pro se*. During petitioners' trial, which began on January 4, 1999, the prosecution relied extensively on expert testimony to establish several propositions critical to their case. As indicated in the materials seized from their law offices, petitioners intended to defend the mail fraud charges against them based in part on the written agreements between Joan Porro and Alfred Porro governing the investments from the Trusts. The prosecution introduced testimony from a purported document expert who claimed the agreements were recent creations. Petitioners objected to the introduction of this testimony as unreliable and standardless, but the district court denied their motions and refused their request for a *Daubert* hearing. On cross-examination it was revealed that, in apparent contravention of FBI and IRS laboratory standards, the document expert made his conclusions about the authenticity of the agreements in accordance with his own standards, based only on a review of photocopies of the agreements. The prosecution also introduced extensive expert testimony concerning the value of petitioners' assets (to support allegations that Alfred Porro provided incorrect information on loan applications), as well as expert testimony concerning supposed improprieties in petitioners' tax returns.

Petitioners attempted to rebut the prosecution's allegations with their own expert testimony. Petitioners were prepared to present at trial testimony from Robert Phillips, a document

expert with over 30 years of experience, who would have supported petitioners' claim that the agreements at issue were authentic. Robert McNerney was offered by petitioners as an expert on property appraisals and New Jersey real estate to address the value of assets Alfred Porro had reported on loan applications. Thomas Nihill, a former criminal investigator for the IRS, was offered to rebut the tax allegations. Prior to the close of the prosecution's case in chief, however, the district court excluded entirely the expert rebuttal testimony of Mr. Phillips, Mr. McNerney, and Mr. Nihill on the ground that petitioners failed to provide timely expert reports pretrial.[3] Yet, the expert report of Mr. Nihill, for example, had been delayed pending receipt of additional information concerning the prosecution's alleged tax violations – information not made available to the defense until the eve of trial. The court made no finding that petitioners exhibited bad faith in their failure to comply with the discovery deadlines. The court also failed to explain how the prosecution would be unfairly prejudiced by the admission of the testimony and neglected to consider less drastic alternatives to full exclusion. The district court formalistically excluded *all* of petitioners' expert testimony, a decision that gravely prejudiced their defense. On March 18, 1999 the jury convicted petitioners on all 19 counts.

The probation office prepared initial presentence reports for petitioners in July, 1999, which revealed for the first time the range of penalties the prosecution intended to pursue against petitioners. Applying the Federal Sentencing Guidelines, the probation office first grouped the mail fraud, money laundering, and obstruction counts together, and then set the base offense level at 17 in accordance with the Guidelines for money laundering (*U.S. Sentencing Guidelines Manual*

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[3] Petitioners also attempted to introduce at trial the expert testimony of Jon Brody concerning real estate valuations and markets. Although his expert report was timely, the court excluded this testimony as irrelevant.

§ 2S1.2 (2000)), the most serious offense. This base offense level was then increased under specific offense characteristic enhancements, including an amount of loss and aggravating circumstances.

Under the premise that petitioners "stole $401,000 from client trust funds," petitioners' offense level was increased to level 20, which corresponded to the sentencing range for money laundering that exceeds $350,000 but is less than $500,000. The amount of $401,000 included the $100,000 petitioners were charged with laundering, plus the $176,000 that petitioners invested out of the Trusts and into Riverview Associates. It also included an additional $100,000 that the probation office contended petitioners had kept from an account held for Margaret Helstoski, the wife of Henry Helstoski, and an additional $25,000 that the probation office claimed petitioners had kept out of an account held for Mary Galofaro, Richard Galofaro's mother. Margaret Helstoski and Mary Galofaro never brought any action at any time to recover such funds from petitioners. Moreover, the prosecution never charged petitioners with any crime pertaining to these two individuals or their funds.

The probation office also asserted that Alfred Porro's false statements on loan applications resulted in a fraud of $423,082 – an amount purportedly based on the approximate balance due on the loans at the time the false statements were discovered, which was an amount entirely unrelated to any actual loan loss. The initial presentence reports further proclaimed that petitioners, for sentencing purposes, were both liable for a total tax loss of $332,223 – an amount that in no way reflected any tax amount petitioners actually owed the IRS. Absolutely none of the loss figures were presented for determination by the jury at trial. With additional enhancements for aggravating circumstances, nearly all of which required factual determinations never presented to or decided by a jury, the initial presentence reports assigned petitioners, who had *no* prior criminal record, total offense levels of 29.

Petitioners contested their initial presentence reports, noting in particular the impropriety of the probation office's inclusion of amounts in the loss determination that were uncharged and unproven. Alfred Porro maintained that the Helstoski allegation was baseless, and that the money at issue represented a legal fee associated with a $5,000,000 insurance settlement that he had obtained for Henry Helstoski, a matter to which Margaret Helstoski had no relationship. The National Center on Institutions and Alternatives (NCIA) prepared an analysis for the court, dated August 5, 1999, of petitioners' initial presentence reports, raising issues with the probation office's improper reliance on unproven losses and inappropriate use of the Guidelines for money laundering. App. 62a-116a. NCIA suggested that probation, not a prison term, was appropriate for the offenses of conviction. Petitioners also submitted Objections and Material Information to the probation office requesting detailed corrections (based on the trial transcripts) to the initial presentence reports, as well as a withdrawal of the improper Guidelines determinations.

On August 9, 1999, in a separate criminal case involving embezzlement and money laundering, the Third Circuit held that it was improper to apply the harsh sentencing guidelines for money laundering to routine fraud cases that did not involve extensive drug trafficking or serious crime. See *United States* v. *Smith*, 186 F.3d 290, 299-00 (3d Cir. 1999). In light of the *Smith* decision, the probation office revised petitioners' presentence reports, and abandoned their prior reliance on a base offense level of 17 for money laundering in favor of the base offense level of 6 for fraud (*U.S. Sentencing Guidelines Manual* § 2F1.1 (2000)). Remarkably, however, the probation office managed to nullify the dramatic impact the *Smith* decision should have had on the determination of petitioners' appropriate sentencing range. By manipulating the counts and utilizing enhancements, the probation office reached a total offense level for petitioners under the fraud guidelines that was only marginally lower than the total

offense level the probation office first recommended when it used the money laundering Guidelines.

Specifically, in the probation office's final presentence report for Alfred Porro, dated August 27, 1999, the false statements on loan application counts were grouped along with the mail fraud, money laundering, and obstruction counts. The inflated $401,000 mail fraud loss was then added to the unrelated $423,082 loan applications loss, resulting in a total purported loss of $824,082, an amount that corresponded to an 11 level enhancement under the fraud Guidelines at $800,000 to $1.5 million. Additional enhancements of 8 levels were then added for more than minimal planning, victim vulnerability, role in the offense, and obstruction of justice, all of which, again, required factual determinations never presented to or decided by a jury. Alfred Porro's total offense level under the probation office's application of the mail fraud sentencing guidelines was 27, only 2 levels below the offense level the probation office initially calculated when it improperly relied on the excessively harsh Guidelines for money laundering. Joan Porro's final presentence report repeated nearly verbatim the presentence report of Alfred Porro, including an extensive discussion of the charges for false statements on loan applications with which she was not even alleged to have been involved. Joan Porro's total offense level in the final presentence report was level 25.

Petitioners again disputed the probation office's revised calculations. On October 5, 1999, NCIA supplemented their initial report to express "continued dismay" with the probation office's "'verbatim recitation [in petitioners' presentence reports] of the factual allegations in the government's Sentencing Memorandum'" and the continued misapplication of the Guidelines to petitioners. App. 118a (quoting App. 86a). At the sentencing hearing on October 8, 1999, Mr. Querques, an attorney who was then speaking on behalf of petitioners, specifically objected to the inclusion of the additional $125,000 in alleged losses for Margaret

Helstoski and Mary Galofaro in the total loss computation. Mr. Querques stated: "since when do we send people to jail, since when do we add numbers to these [federal sentencing] guidelines when the charges are not even made in the indictment, and are not proven in the courtroom? Are we dispensing with the need for an indictment and testimony? We've dispensed with a lot of things, but never with that." Trial Tr. at 69-70, *United States* v. *Porro*, No. 96-420 (D.N.J. Oct. 8, 1999). The court, however, adopted the findings of the final presentence reports in their entirety, refused to apply any downward departure, disregarded NCIA's criticism of the interaction between the prosecutor's office and the probation office, and imposed a term of imprisonment on Alfred Porro of 5 years and 10 months on the money laundering and false statement counts and a concurrent 5 year term on the remaining counts. Joan Porro was sentenced to 4 years and 9 months on the money laundering count, and a concurrent, identical term on all other counts. Inexplicably, these sentences were inconsistent with the manner in which the counts were grouped in the presentence report that formed the basis for the range of sentences adopted and applied by the judge. Moreover, petitioners were required to make restitution to Mary Galofaro in the amount of $25,000, and to Margaret Helstoski in the amount of $125,000.

On appeal, petitioners' money laundering convictions were reversed on the grounds that the district court erroneously instructed the jury that a mail fraud scheme could create proceeds before the mailing ever took place. The court of appeals nevertheless held that the district court's failure to strike the money laundering count, the gravaman of the prosecution's case, was harmless error. The court affirmed the convictions for all other counts and upheld the sentences imposed on petitioners. On October 25, 2000, the court of appeals denied petitioners' motion for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS IN *JONES* v. *UNITED STATES*, 526 U.S. 227 (1999) AND *APPRENDI* v. *NEW JERSEY*, 120 S. CT. 2348 (2000).

In this case, the Third Circuit has affirmed sentences that were significantly enhanced by factual charges that the prosecution did not include in the indictment and did not prove beyond a reasonable doubt. Most notably, these factual charges included the amount of loss at issue and the aggravating circumstances. The holding of the court of appeals directly conflicts with the clear rationale of this Court's decisions in *Jones* v. *United States*, 526 U.S. 227 (1999), and *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000). Contrary to these decisions, the sentencing court made critical factual determinations by a preponderance of the evidence to assess an amount of "loss" that would be dispositive in calculating petitioners' sentences under the Guidelines. Though never charged in the indictment or found by the jury, the sentencing court adopted the exact amount of loss claimed in the probation office's presentence reports which themselves only repeated the prosecution's loss claims. Moreover, the prosecution's purported loss amount included not only unalleged and unproven losses ostensibly associated with the conduct petitioners were charged with, but also significant additional losses associated only with other, unrelated and allegedly improper activities with which petitioners were neither charged nor convicted. The district court further increased petitioners' sentences based on its factual determination, again by a preponderance of the evidence standard, that the offenses involved all of the aggravating circumstances claimed by the prosecution at sentencing. This determination included findings that the subjects of petitioners' criminal conduct – three banks, the United States Internal Revenue Service, and two trust

beneficiaries – were "vulnerable victims," that petitioners' offenses involved more than minimal planning and a scheme to defraud more than one subject, and that petitioners abused a position of trust and used a special skill in committing the offense. The court's factual determinations by a preponderance of the evidence with respect to loss and aggravating circumstances resulted in the imposition of sentences dramatically above the range of sentences supported by the indictment and the jury verdict.

In *Jones* v. *United States*, this Court expressed serious doubt concerning the constitutionality of allowing penalty enhancing findings to be determined by a judge by a preponderance of the evidence. The Court noted in *Jones* that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 526 U.S. at 243 n.6. In *Apprendi*, this Court expressly endorsed the rule set forth in the concurring opinions in *Jones* that "'it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" 120 S. Ct. at 2363 (quoting 526 U.S. at 252-53). "'[S]uch facts must be established by proof beyond a reasonable doubt.'" *Id.* In imposing sentences upon petitioners based directly on losses and aggravating circumstances determined by the sentencing judge under a preponderance of the evidence standard, the district court violated the constitutional protections guaranteed to petitioners under the Fifth and Sixth Amendments.

Here, the district court instructed the jury that loss was not an element of any of the charges against petitioners. Following convictions on all counts, the probation office and the district court adopted the prosecution's loss claims wholesale. For purposes of sentencing, a loss due to fraud of

$824,082 was attributed to Alfred Porro. Joan Porro was held responsible for $401,000 in fraudulent losses. Both petitioners were deemed liable for a total tax loss of $331,633. The entire issue of loss, actual or otherwise, was never presented to, or determined by a jury.

Petitioners contend that under the rule of law established by this Court in *Apprendi*, absent a finding by the jury of the amount of loss for which each of them is liable, the district court is authorized to impose a term of imprisonment within the range provided for by the Guidelines for the base offense alone. The district court thereby impermissibly increased petitioners' base offense level under the Guidelines for fraud from a level 6 to a level 15 for Joan Porro (a 250% increase), and to a level 17 for Alfred Porro (a 283% increase). Again, none of these loss figures were presented to the jury and $125,000 of the total amount (which petitioners purportedly owed Margaret Helstoski and Mary Galofaro) purportedly resulted from acts for which petitioners were never charged or convicted.

Similarly, petitioners' contend that the district court improperly imposed sentence enhancements on them for the aggravating circumstances described above. The factual bases for these were never alleged in an indictment or found by a jury. Based upon a preponderance of the evidence, the district court increased petitioners offense level an additional 6 levels for these aggravating circumstances, thereby doubling their base offense level. Taken together, the enhancements, based upon losses and aggravating circumstances, approximately quadrupled petitioners' base offense level of 6. As a result, Joan Porro was sentenced to a period of incarceration of 57 months, nearly *ten* times the maximum period provided for under the base offense level. Alfred Porro was sentenced to 70 months, nearly *twelve* times the maximum sentence under the same base offense level (6 months). The Fifth and Sixth Amendments, however, prohibit the sentencing court from making just such findings that amount

to "a tail which wags the dog of the substantive offense." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88 (1986).

The courts of appeals and district courts continue to struggle with defining the scope of *Apprendi*, generating widespread uncertainty over the extent to which courts may decide factual issues that determine an offender's sentence by a preponderance of the evidence standard. Accordingly, further direction from this Court is necessary at this time. Lower courts have generally found that the holding of *Apprendi* is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S. Ct. at 2362-63. There is, however, substantial conflict among the circuits over how to interpret the phrase "prescribed statutory maximum." The Ninth Circuit has found that it "refers simply to the punishment to which the defendant is exposed solely under the facts found by the jury." *United States* v. *Nordby*, 225 F.3d 1053, 1059 (9th Cir. 2000) (holding that, regardless of the absolute maximum sentence provided for under the statute, if the drug amount in a criminal proceeding is not determined by a jury, the judge at sentencing may not increase the offenders sentence based on an amount of drugs determined by a preponderance of the evidence); see also *United States* v. *Jones*, No. 97-1377, 2000 WL 1854077 (10th Cir. Dec. 19, 2000) (holding that under *Apprendi*, the quantity of drugs is an essential element of the offense if that fact exposes the defendant to a heightened maximum).

Other courts, however, have largely disregarded the underlying rule of law upon which *Apprendi* is founded; namely that "the judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." 120 S. Ct. at 2359 n.10. These courts have instead adopted an unreasonably narrow view of the scope of *Apprendi*, holding that it categorically does not apply if the sentence imposed upon the offender does not exceed the

absolute maximum provided for under the substantive offense. See *United States* v. *Cepero*, 224 F.3d 256, 267 n.5 (3d Cir. 2000) ("[b]ecause application of the Sentencing Guidelines in this case does not implicate a fact that would increase the penalty of a crime beyond the statutory maximum, the teachings of *Apprendi* are not relevant here") (full citation omitted); see also *United States* v. *Heckard*, No. 99-2186, 2001 WL 15532 (10th Cir. Jan. 8, 2001); *United States* v. *Kinter*, No. 99-4621, 2000 WL 1853317 (4th Cir. Dec. 19, 2000). Although such a bright line test has the superficial appeal of being very easily followed, such an interpretation relegates the principled reasoning of *Apprendi* to only the most extraordinary cases, and completely disregards this Court's fundamental support in *Apprendi* for the constitutional protections afforded under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment.

Under the narrow interpretation of *Apprendi* adopted by many courts, including the Third Circuit, even though no amount of loss or aggravating circumstance was ever charged in the petitioners' indictment or proven to the jury, the district court could have sentenced petitioners to as much as 30 years in a federal penitentiary – the statutory maximum for fraud that affects a financial institution – without running afoul of this Court's holding in *Apprendi*.[4] Such an interpretation of

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[4] Petitioners were convicted under the general fraud statute, 18 U.S.C. § 1341, which carries a maximum prison term of 5 years, unless the "violation affects a financial institution," in which case the maximum penalty is increased to 30 years. Following petitioners' conviction, the probation office was uncertain about which maximum sentence could be imposed on petitioners. The probation office's initial presentence report for Joan Porro classified the mail fraud charges against her as a Class D felony carrying a maximum sentence of 5 years under 18 U.S.C. § 1341. Without explanation, the probation office later revised Joan Porro's presentence report to classify the mail fraud charges against her as a Class B felony carrying a maximum sentence of 30 years under 18 U.S.C. § 1341. The district court simply adopted Joan Porro's final presentence

Apprendi ignores the fact that the Guidelines rendered the statutory range under particular criminal offenses largely irrelevant, relegating the role of the statutory maximum to that of only an absolute upper bound on the wide range of sentences potentially imposed under the Guidelines. A court's discretion to impose a sentence is limited by the Guidelines in a nearly identical manner as it is limited by the statutory maximum of the substantive offense. The Guidelines have been recognized to "have the force and effect of laws, prescribing the sentences criminal defendants are to receive." *Mistretta* v. *United States*, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting). In cases such as this, where the alleged statutory offenses were enacted before the Sentencing Reform Act of 1984, the statutory maximum has been superceded by the subsequent adoption of the Guidelines. The determinant sentencing regime of the mandatory Guidelines provides explicit sentencing minimums and maximums for statutory offenses that are essentially no less legally binding on courts than the prior statutory maximum. Moreover, to the extent the Guidelines dictate a required range of sentences, or sentence enhancements, for particular aggravating circumstances or loss amounts that were not expressly provided for in the pre-existing statutory provision, the Guidelines have essentially established additional elements for the substantive offense that must be charged and proven beyond a reasonable doubt.[5]

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report in its entirety, never addressing whether or not the potential maximum sentence she faced for the mail fraud was properly classified. Alfred Porro's conviction for false statements on loan applications also carried a maximum term of imprisonment of 30 years. The remaining tax violations and obstruction of justice charges carried maximum prison terms of no more than 5 years. 18 U.S.C. § 1957(a), 26 U.S.C. §§ 7201 and 7206(1).

[5] This Court has already indicated by the grant of certiorari in a number of other cases following *Apprendi* that the applicability of *Apprendi* does not turn solely on whether or not a sentence falls within the statutory maximum. For example, in both *Clinton* v. *United States*, 121 S. Ct. 296

Where, as here, the range of sentences to which an offender is subject depends upon specific factual determinations, the constitutional protections contained in the Fifth and Sixth Amendments prevent a sentencing court from making those factual determinations by a preponderance of the evidence. This is so regardless of whether the need to resolve those factual determinations arose directly under the statutory offense or under the Guidelines. As Justice Thomas explained in his *Apprendi* concurrence, "if the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact – such as a fine that is proportional to the value of stolen goods – that fact is also an element." 120 S. Ct. at 2369.[6] The amount of loss and the presence of aggravating circumstances were facts upon which petitioners punishments were set, and if such facts were to be relied upon at sentencing, then they were elements of the crime that had to be proven at trial. See 120 S. Ct. at 2356.

Petitioners do not contend that to be convicted under the mail fraud statutes the prosecution had to prove a specific loss to the jury, or had to establish a factual basis of aggravating circumstances such as victim vulnerability. Instead, petitioners merely maintain that where the prosecution chooses not to plead or prove the amount of loss or the factual bases to support aggravating circumstances, it does so at its own peril. In such cases, the district court may not drastically increase

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(2000) and *Garcia* v. *United States*, 69 U.S.L.W. 3259 (U.S. Jan. 8, 2001), this Court granted certiorari where petitioners challenged the constitutionality in light of *Apprendi* of sentences that were within the statutory maximum of the substantive offense, but that were based on factual determinations made at sentencing by a preponderance of the evidence. In both of these cases, this Court vacated the judgment and remanded the case to the court of appeals for further consideration in light of *Apprendi*.

[6] Justice Thomas also details at length in his *Apprendi* concurrence the historical practice of requiring in cases of theft the amount of loss to be specifically indicted and found by a jury. *Apprendi* v. *New Jersey*, 120 S. Ct. 2348, 2369-70 (2000).

the range of sentences applicable to defendants under the base offense level of the Guidelines to reflect losses and aggravating circumstances found by the judge after the jury trial by only a preponderance of the evidence.

As a practical matter, petitioners' approach does not negatively impact the prosecution's ability to seek any penalty in a particular case it desires, so long as the prosecution provides a defendant with proper notice of the allegations, and submits the allegations for determination by a jury beyond a reasonable doubt. Moreover, this approach promotes the goal of determinant sentencing, enabling offenders to determine from the charges specified in the indictment a much more precise range of possible sentences. It is constitutionally impermissible to require that petitioners wait until sentencing to learn where their sentences will fall across the broad range of 0 to 30 years, and there is no rational support for a sentencing structure that leaves even the probation office, as it was in this case, uncertain after a full jury trial and conviction, of whether petitioners could be imprisoned a maximum of 5 years, or a maximum of 30 years.

Accordingly, this Court should grant the writ to clarify that: (1) *Apprendi* is not limited solely to cases in which the offender's sentence exceeds the statutory maximum of the substantive offense; (2) where the base offense level for an offense under the Guidelines is significantly increased by the amount of loss and aggravating factual circumstances, the amount of loss and factual circumstances are elements of the crime that must be charged and adjudicated; and (3) that where the amount of loss and aggravating circumstances are established only at sentencing by a preponderance of the evidence, the offender's maximum sentence is limited to the maximum period specified by the base offense level. Alternatively, this court should grant, vacate and remand this case to the Court of Appeals for the Third Circuit for further determinations in light of *Apprendi*.

II. A CONFLICT AMONG THE CIRCUITS EXISTS CONCERNING THE STANDARD BY WHICH A TRIAL COURT MAY EXCLUDE DEFENSE EVIDENCE AS A SANCTION FOR DISCOVERY VIOLATIONS.

The proceedings below squarely present the question of whether, consistent with petitioners' Sixth Amendment rights, a District Court may exclude defense expert witnesses as a discovery sanction without a finding that: (1) the defense engaged in willful misconduct; (2) the prosecution was unfairly prejudiced; (3) the defense evidence was not dispositive; and (4) no less severe alternatives were available. The question's importance lies in its critical impact on the ability of the defense to present its case and in the likelihood that the question will arise repeatedly in modern criminal courtrooms where expert testimony is more and more commonplace.

Here, petitioners' delays in presenting the three expert reports at issue were fairly attributable to the prosecution and to the manner in which the prosecution structured its case. See *supra* pp. 8-9. The district court made no findings and offered no reasons as to the propriety of exclusion in light of petitioners' established Sixth Amendment rights under the Compulsory Process Clause and perfunctorily excluded not only the testimony of the three experts at issue, but the testimony of a fourth expert, whose report was timely, as well. *Id.* The district court's ruling in this regard was terminal to petitioners' defense.

In *Taylor* v. *Illinois*, 484 U.S. 400, 414 (1988), the Court resolved the issue of whether it is ever permissible for trial courts to use exclusion as a discovery sanction against a defendant in a criminal case. The Court rejected the argument that such a sanction would amount to a *per se* Sixth Amendment violation. Instead, the Court recognized that it is necessary to balance the competing interests of, on the one hand, the defendant's right to present a defense and on the

other hand, the integrity of the adversary process. *Id.* In balancing these competing interests, the Court found it "neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case." *Id.* However, the Court emphasized that "[a] trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial." *Id.* at 415. Where the explanation reveals that the failure to comply was both "willful and motivated by a desire to obtain a tactical advantage" then "it would be entirely consistent with the purposes of the compulsory process clause simply to exclude the witness' testimony." *Id.* at 415.

While not setting forth "comprehensive standards" the decision in *Taylor* flowed from two overarching principles: (1) at a minimum, it is necessary for the trial court to undertake a balancing test in order to weigh a defendant's right to compulsory process against several factors that might affect the integrity of the trial process (*e.g.*, wilfulness, probative value, available alternatives) and (2) where misconduct and an effort to seek tactical advantage are apparent, exclusion is appropriate. Since the *Taylor* decision, numerous courts of appeals have diverged in their interpretations and applications of that decision. A number of circuits have required that trial courts assess the several factors for decision identified in *Taylor*. Others have held that the trial court's exercise of discretion in the matter governs, so long as the exercise of that discretion meets a broad "reasonableness" test.

The First, Second, Eighth and Ninth Circuits, for example, have held that "exclusion of defense witnesses who would be helpful to the defendant is permissible only if the violation of the discovery order was deliberate . . . as it was in *Taylor* itself." *Tyson* v. *Trigg*, 50 F.3d 436, 445 (7th Cir. 1995). The opinion in *Tyson* is instructive and acknowledges the split in the circuits. The First Circuit, in *Bowling* v. *Vose*, 3 F.3d 559

(1st Cir. 1993), placed paramount importance on the absence of willful misconduct, recognizing that courts "have upheld the exclusion of a witness when a party willfully violates the discovery rules to gain a tactical advantage in litigation." *Id.* at 561. The First Circuit also acknowledged this Court's ruling in *Michigan* v. *Lucas*, 500 U.S. 145 (1991), which expanded upon *Taylor*, and held that "[w]e did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather, we acknowledged that alternative sanctions would be 'adequate and appropriate in most cases.'" *Bowling*, 3 F.3d at 561 (quoting 500 U.S. at 153). Following *Lucas*, the First Circuit thus recognized that the availability of lesser sanctions was an additional factor to be considered by trial court's faced with defense violations of discovery orders.

The Ninth Circuit, in *United States* v. *Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991), observed the Court's admonition in *Taylor* that "'few rights are more fundamental than that of an accused to present witnesses in his own defense'" (quoting 484 U.S. at 408) and further observed that "the Court has upheld the drastic remedy of excluding witnesses only in cases involving 'willful and blatant' discovery violations." 937 F.2d at 1426 (quoting 484 U.S. at 416). In *Escalera* v. *Coombe*, 852 F.2d 45 (2d Cir. 1988) (per curiam), the Second Circuit remanded for a finding as to whether defense counsel's "conduct was sufficiently willful under *Taylor* to support preclusion" on the ground that "absence of a good excuse is not necessarily commensurate with 'willful' conduct." *Id.* at 48.

Other Circuits, including the Seventh Circuit in its decision in *Tyson*, have applied a broader "reasonableness" test. See *Tyson*, 50 F.3d at 445 ("We must examine [the state trial court's] ruling for conformity with the standard of reasonableness."). See also *United States* v. *Johnson*, 970 F.2d 907, 911 (D.C. Cir. 1992) ("we do not read *Taylor* as establishing 'bad faith' as an absolute condition for exclusion. . . . [W]e agree with those circuits that have treated bad faith

as an important factor but not a prerequisite to exclusion"); *Watley* v. *Williams*, 218 F.3d 1156, 1159 (10th Cir. 2000) (no error where, although counsel did not "hide" existence of alibi witness, notice of alibi witnesses was not provided pre-trial and rebuttal would have required continuance so that "ten to fifteen witnesses" could be re-interviewed). The split has only widened since the *Tyson* decision was rendered in 1995. See also *Anderson* v. *Groose*, 106 F.3d 242, 246 (8th Cir. 1997) (where "no court in this case has found, nor is there anything on the record to indicate, that trial counsel was willful in her noncompliance with the discovery rules . . . the state trial court erred in excluding [an alibi witness'] testimony). As articulated by the Seventh Circuit in *Tyson*: "The area of uncertainty concerns the case in which the excluded witnesses would undoubtedly have been at least somewhat helpful to the defense and the violation of the discovery order was not willful." 50 F.3d at 445.

The record in this case amply reflects both circumstances. The defense proffered the testimony of three expert witnesses whose testimony would have been helpful in rebutting similar testimony adduced by the prosecution in its case-in-chief. See *supra* pp. 8-9. Petitioners' inability to comply with the district court's discovery order was neither willful, nor designed to obtain a tactical advantage. For example, petitioners' tax expert, Mr. Nihill, did not receive the specific data upon which the prosecution's expert was to rely until the eve of trial. *Id.* Such information was not independently available to petitioners because IRS agents had seized all of petitioners' files. See *supra* p. 7. The prosecution's document expert did not disclose his utilization of idiosyncratic laboratory standards until his cross-examination. See *supra* pp. 8-9. The prosecution presented its evidence on property value through a non-expert witness and the absence of a pre-trial report on this topic delayed the preparation of a defense

expert's rebuttal report.[7] Given the nature of this proceeding, involving complicated allegations of tax evasion, document tampering and false loan applications, the excluded evidence was "of decisive value." In fact, there is no record evidence that the trial court made any findings regarding willfulness or even undertook *any* form of balancing test.[8] In short, by any measure, the trial court ignored the dictates of *Taylor*.

The unpublished opinion of the Third Circuit turned the *Taylor* decision on its head. Whereas Taylor held, *inter alia*, that there was no absolute constitutional bar against exclusion of defense evidence as a discovery sanction, the Third Circuit held in conclusory fashion that such exclusion was a permissible sanction without any analysis of the constitutional protections involved. The court of appeals stated simply "[i]n *Taylor*, the Court held that a defendant's Sixth Amendment right to present exculpatory evidence is not unlimited, and that preclusion of defense evidence can be an 'entirely proper method of assuring compliance with' a discovery order." App. 21a (citations to *Taylor* omitted). The court of appeals made no reference to any of the factors identified in the *Taylor* opinion or to those identified in the opinions of other circuits.

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[7] Petitioners exhausted every avenue to attempt to obtain the data required in order to rebut the testimony of prosecution experts. Two requests for a bill of particulars and discovery were denied. The trial court denied a specific request for a *Daubert* hearing (regarding the testimony of the prosecution's document expert) and a request for the specific data upon which the prosecution's tax expert relied. The required tax data, by way of a government supplemental expert report was severed upon the defense 2 and 1/2 weeks before trial.

[8] Had the district court done so, the factors identified in *Taylor* v. *Illinois*, 484 U.S. 400 (1988), and *Michigan* v. *Lucas*, 500 U.S. 145 (1991), indisputably would have favored petitioners. In addition to the probative value of the proffered defense testimony and the absence of willfulness, the prosecution could not have reasonably made a claim of prejudice because it had for years been in possession of petitioners' defense files which outlined the proposed defense case. *See supra* p. 7.

Given the acknowledged uncertainty in the Circuits with respect to what is required in order to permit exclusion of defense testimony as a sanction, certiorari is warranted in order to resolve the confusion in the courts of appeals and to provide further guidance to the district courts.

III. IN DECLARING THAT PETITIONERS HAD WAIVED ALL SENTENCING ISSUES SOLELY BECAUSE OF INSUFFICIENT BRIEFING AND ARGUMENT, THE THIRD CIRCUIT DEVIATED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioners raised a series of alleged sentencing errors in the appeal to the circuit court, none of which the court of appeals addressed on the merits. Instead, the court of appeals expressly refused to consider the serious issues petitioners had raised with their sentences, choosing instead to simply deem the Porros' to have waived their challenges to their respective sentences. It is undisputed that petitioners properly raised issues with their sentences in their appeals, including the improper grouping of unrelated counts for sentencing purposes, the improper application of various sentencing enhancements, and most importantly, the faulty bases for determining the amount of loss at issue which established the maximum range of applicable terms of imprisonment. Petitioners' supported their allegations of sentencing errors with citations to sixteen federal cases. In the reply brief of Alfred Porro on appeal he specifically maintained that the government "can not indict on one case and request sentencing on another as here. The loss, if any, 'must still be directly and proximately caused by the criminal conduct' charged." Reply Brief at 36, *United States* v. *Porro* (Nos. 99-5278 & 99-5369) (3d Cir. 2000) (citing *United States* v. *Akande*, 200 F.3d 136, 141 (3d Cir. 1999)). Moreover, when this Court's decision in *Apprendi* was issued on June 26, 2000, petitioners promptly submitted it to the court of appeals as supplemental authority under Federal Appellate Rule of

Procedure 28(j) to further buttress their allegation that their sentences were improperly based on factual determinations that were never contained in an indictment or found by a jury.

The issue related to sentencing based upon uncharged and unproven losses raised by petitioners in their initial appeal mirrors the issue subsequently addressed in *Apprendi*. The court of appeals, however, refused to address any of petitioners' contentions, and voiced no opinion on the applicability of *Apprendi* to their sentencing. Instead, the court of appeals adopted the prosecution's characterization of the alleged sentencing errors as a "scattershot attack" which the court scathingly described as "empty rhetoric. ... wholly devoid of legal argument beyond self-serving, conclusory statements." App. 22a-23a. The court abandoned entirely its duty to resolve the issues presented by petitioners pertaining to the period of time they were sentenced to serve in a federal penitentiary based upon the sole premise that "briefs must contain statements of all issues presented for appeal, *together with supporting arguments and citations*." App. 22a (quoting *Simmons* v. *City of Philadelphia*, 947 F.2d 1042, 1065 (3d Cir. 1991)) (emphasis in original). Contrary to the court of appeals assertion, however, *Simmons* provides absolutely no support for the proposition that the court of appeals has authority in a criminal proceeding to deem waived any properly appealed issue it subjectively determines was poorly briefed. *Simmons* v. *City of Philadelphia*, 947 F.2d 1042, 1065 (3d Cir. 1991) (noting in a civil proceeding seeking damages for wrongful death, "the well established rule that 'failure to raise an issue in the district court constitutes a waiver of the argument'") (citations omitted). The only other case relied upon by the court as support for its finding of waiver was *Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993), also a civil proceeding and one in which the court found waiver of an issue on appeal where the appellants did not set forth the issue in their issue statement, provided no arguments or citations in their brief, and, in fact, conceded the

issue was not argued on appeal. *Id.* at 182. Petitioners, by contrast, raised specific issues with respect to sentencing errors in the issue statement of their appeals, provided extensive citation and argument expressly on these issues in their briefs and reply briefs, and in no way conceded that the issue was not argued on appeal. Moreover, petitioners prepared their appeal briefs *pro se*, under the limitations imposed by being incarcerated at a federal penitentiary, and, unlike the cases cited by the court of appeals, petitioners' contentions raised the critical issue of whether the period of time for which they were to be deprived of their liberty had been erroneously determined in a criminal proceeding. The Third Circuit's attempt to loosely apply the waiver doctrine is a grave encroachment on the rights of defendants, who have properly raised issues in an appeal, to have those issues decided by the court on the merits. *Cf.*, *Mitchell* v. *United States*, 526 U.S. 314 (1999) (rejecting the Third Circuit's decision to treat either a petitioner's guilty plea or her statements at the plea colloquy as a waiver of her right to remain silent at sentencing).

Similarly, while the court of appeals reversed petitioners conviction for money laundering, the court incorrectly stated, *without citation*, that petitioners "concede[d] that their conviction on the money laundering count did not affect their respective sentences." App. 11a. Petitioners made no such concession. Moreover, while petitioners' sentences were ultimately calculated under the mail fraud Guidelines, not the money laundering Guidelines, their sentences were based upon a presentence report that incorporated the improper conviction on money laundering charges.[9] Where a reversal of such magnitude is made on appeal, it is proper to remand

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[9] As noted above, the probation office's initial presentence reports were actually based on the Guidelines for money laundering, strongly suggesting that the money laundering count likely had an impact on Petitioners' sentences even though the Guidelines for fraud were ultimately used in calculating the sentences.

the case for resentencing, not to simply presume it had no impact. See *United States* v. *Tucker*, 404 U.S. 443 (1972) (holding that it was proper to remand the case for reconsideration of a sentence when the district judge explicitly took into account the defendant's record of prior convictions, and it was determined that two of the convictions were constitutionally invalid); see also *McGee* v. *United States*, 462 F.2d 243, 246 (2d Cir. 1972) (noting that "[w]hen the invalidity of the conviction on one count which may have influenced the sentence becomes apparent on an appeal, . . . the proper course is usually to vacate the sentences and remand for resentencing on the valid counts without consideration of the invalid one"). There is no basis in law for the court of appeals to deem waived all of petitioners' properly appealed objections to their sentencing, and to assume that they somehow conceded the absence of any impact at sentencing of the vacatur of the most serious charge against petitioners, money laundering. Such an improper deviation from the accepted and usual course of judicial proceedings warrants the exercise of this Court's power of supervision and the granting of this petition for certiorari, so that petitioners can be resentenced in accordance with the law on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNREPORTED—NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-5278 and 99-5369

UNITED STATES OF AMERICA

v.

ALFRED A. PORRO, JR.

Appellant at 99-5278

UNITED STATES OF AMERICA

v.

JOAN ATKINS PORRO,

Appellant at 99-5369

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Nos. 96-cr-00420-1 and 96-cr-00420-2)
District Judge: Honorable Joseph H. Rodriguez

Submitted Under Third Circuit LAR 34.1(a)
June 1, 2000

BEFORE: SCIRICA, and NYGAARD, *Circuit Judges*, and POLLAK, *District Judge*[1]

(Filed: August 22, 2000)

MEMORANDUM OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

A federal jury convicted Alfred and Joan Porro, husband and wife, on all counts with which they were individually charged in a nineteen-count, second superseding indictment. In this joint appeal, the Porros claim that the District Court committed multiple, reversible errors, and that they are entitled to either acquittal or a new trial on all of the counts with which they were charged. We will reverse the Porros' conviction on the single money laundering count with which they were both charged, but will affirm the District Court in all other respects.

I. Background

The multi-count indictment against the Porros stemmed from a complex web of criminal activities involving several separate business activities in which they were engaged. Throughout the period relevant to this case, the Porros practiced law together at their law firm. Porro & Porro. In addition, Alfred was involved in several small business and real estate ventures, including one to develop 25 acres in the Meadowlands in East Rutherford. New Jersey. At the same time, Joan was trustee of three trusts established by the will of a former client. Together, the Porros were also trustees of

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[1] The Honorable Louis H. Pollak, District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

money deposited in their client trust account. All the while, Alfred was financing the Porros' law practice, in part, through lines of credit obtained from three New Jersey Banks. He also applied for, and obtained, additional bank loans to finance his other business activities.

In May and June 1994, a grand jury investigating allegations that the Porros had misappropriated trust funds under their control served them with subpoenas seeking documents related to those trusts. On January 4, 1995, government agents executed warrants to search the Porros' home and business offices. To avoid violating the attorney-client privilege, the agents had been instructed to limit their search to those files involving four specific Porro clients, and that they could not seize files related to any other clients. *See* J.A. at 811.

At least one of the Porros was present at each search location to advise the agents concerning any file that might contain privileged documents. When an agent presented Alfred with a particular file, however, Alfred refused to advise the agent whether it might contain privileged documents. Instead, he simply told the agent that he should "be the judge of that as to whether [the agent] wanted to take it or not." S.A. at 80:7-10. As a result of the search, the agents seized a large number of files from the Porros' home and business offices. Neither the Porros nor anyone else present during the searches objected to the seizure of any files. Alfred also refused to review or sign a copy of the agents' search inventory.

On January 10, 1995, the agent who had supervised the Porro searches, together with an Assistant United States Attorney, began reviewing some of the files seized from the Porros' offices. In the course of their review, the pair briefly opened a file that they realized contained "some type of communication between the Porros and [their] defense attorney." J.A. at 813. The agent later testified that they had

opened the file "for no more than two seconds" and that they immediately "realized that there was a problem, that some possible privileged communications had been seized during the search." *Id.* Consequently, they immediately resealed the file, delivering it and all files seized from the Porros' offices to another Assistant United States Attorney not involved in the case.

Thereafter, this second Assistant United States Attorney was responsible for reviewing the files seized from the Porros' offices, and for identifying and segregating those documents that contained arguably privileged communications. In this manner, the government created a so-called "Chinese" or "Ethical" wall between any potentially privileged documents and the attorneys attempting to build a criminal case against the Porros. For more than a year, the reviewing attorney attempted to secure the Porros' cooperation in identifying potentially privileged documents. Ultimately, however, the Porros' dilatory conduct made it impossible for the government to resolve the privilege issue without the intervention of the District Court.[2]

On July 26, 1996, a federal grand jury returned a sealed, four-count indictment against the Porros. On December 13, 1996, the grand jury returned a sealed, seventeen count, superceding indictment. Warrants for the Porros' arrest were issued that same day. The superceding indictment was unsealed on December 17, 1996. On January 28, 1997, the Porros filed a motion to suppress, and to return, inventory,

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[2] Following a ten-day hearing, the District Court conducted its own *in camera* review of the documents at issue. It then issued an order identifying those documents the court had determined to be privileged, and authorizing the government's reviewing attorney to return all non-privileged documents to the prosecution team. In a subsequent order, the District Court rejected several other bases on which the Porros had argued that the evidence seized from their offices should be suppressed.

and enjoin the use of evidence seized during the search of their offices.

On July 11, 1997, the grand jury returned a nineteen-count, second superseding indictment against the Porros. Counts 1 through 3 charged the Porros with mail fraud based on three separate mailings in which they had allegedly provided trust beneficiaries and their guardian with false accounting statements intended to hide the Porros' misappropriation of trust funds to support their own failing business ventures. Count 4 charged the Porros with money laundering in connection with the same alleged misappropriation of trust funds. Count 5 charged the Porros with conspiracy to obstruct justice based on allegedly false documents they provided to the grand jury, again to conceal their misappropriation of trust funds. Counts 6 through 14 charged Alfred Porro with supplying several banks with false financial and other statements in connection with his attempts to secure and maintain lines of credit and other business loans. Count 15 charged Joan Porro with tax evasion in connection with alleged underreporting of income on her 1989 tax return. Counts 16 through 18 charged both Porros with false subscription to personal tax returns that allegedly underreported income from their various business ventures. Count 19 charged Joan Porro with false subscription on the 1990 tax return for the Porro & Porro partnership. A jury ultimately convicted both defendants on all counts with which they were individually charged. This appeal followed.

II. Discussion

Appealing jointly, but filing separate briefs, the Porros raise 10 separate issues in this appeal. Beginning with those raised in Joan Porros' brief, we discuss each issue in turn.

A. Issues Raised in Brief of Joan Porro

1. The Mail Fraud Counts

The Porros assert two grounds for acquittal or, at a minimum, a new trial on the three counts of mail fraud with which they were charged. First, they argue that the government failed to adduce sufficient evidence that the mailings in question were sufficiently connected to the alleged fraud to support a conviction on the charge. Second, they argue that the District Court's instructions to the jury on the charge were erroneous and denied the Porros their right to a fair trial. We reject both arguments.

The mail fraud counts were based on a series of acts the Porros committed over a five year period. In July 1991, the Porros found themselves unable to produce the cash necessary to keep their personal investment in the Meadowlands property afloat. Finding a convenient source of funds in the trusts she controlled, Joan Porro wrote checks from the trust accounts payable to the failing business venture. The venture, in turn, used the funds to pay its general contractor. In annual accountings mailed to the trust beneficiaries' guardian in February 1992, 1993 and 1994, Joan failed to reveal that the money had been withdrawn from the trust accounts, and falsely reported that previous withdrawals were earning investment interest. As a consequence, the guardian paid income tax on the phantom interest earnings each year.

The Porros argue that the annual accounting mailings cannot form the basis of a mail-fraud charge because, at most, they were the means by which the alleged fraud was concealed, not actually committed. They are thus entitled to acquittal, the Porros argue, because "the mailings were not proven as part of the alleged scheme," and they were never charged with the separate crime of fraudulent concealment.

See Br. of J. Porro at 13. The District Court rejected this argument, as do we.

Our review of the Porros' argument is limited to determining whether the trial record contains sufficient evidence to support their conviction on the mail fraud counts. *See United States v. Aguilar*, 843 F.2d 155, 157 (3d Cir.), *cert. denied*, 488 U.S. 924 (1988). In so doing, we must view the evidence in the light most favorable to the government. "The elements required to support a conviction under the mail fraud statute, 18 U.S.C. § 1341, are: 1) a scheme to defraud; and 2) the use of the mails for the purpose of executing, or attempting to execute the scheme." *United States v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994) (citation omitted). The mailing in question will not support a conviction unless it furthers the scheme or is "incident to an essential part of the scheme." *Id.* (citations omitted). Nevertheless, even a mailing related to a valid business purpose, including an annual trust accounting, will support a mail fraud conviction if, *inter alia*, it facilitates concealment of the underlying scheme. *See id.* at 798 (citing *United States v. Brown*, 583 F.2d 659, 668 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979)).

The Porros argue that materials intended to conceal their misappropriation of trust funds, mailed months and even years after the misappropriation was complete, could not be deemed as undertaken in furtherance of or incident to an essential part of their misappropriation scheme. The argument, however, is belied by the very cases on which the Porros rely for support. For instance, in *United States v. Tanopol*, we noted that:

> In each case the question is whether or not the mailings were sufficiently closely related to the respondent's scheme to bring his conduct within the statute. Moreover. . . the close relation of the mailings to the scheme does not turn on time or space, but on the dependence in some way of the completion of the

> scheme *or the prevention of its detection* on the mailings in question.

561 F.2d 466, 471-72 (3d Cir. 1977) (internal quotations and citations omitted).

In *Frey*, a case that the Porros fail to mention, we upheld mail fraud convictions based on mailings connected with the defendants' prior, fraudulent application for a loan on a non-existence boat. There, as here, the indictment charged the defendants with a single, on-going scheme in which the mailings in question played an integral, if later, part. *See Frey*, 42 F.3d at 798. Thus, the mere fact that the accounting materials at issue in this case were mailed after the Porros had already misappropriated trust fund money does not mean that those mailings cannot support their conviction for mail fraud. The Porros' argument to the contrary is without merit.

The Porros next challenge the District Court's jury instructions on the mail fraud counts. Those instructions charged the jury, in part, that:

> Fraud is measured in a particular case by determining whether the scheme demonstrated a departure from honesty, moral uprightness or fair play and candid dealings in the general life of the community. Fraud embraces all the means general human ingenuity can devise to gain an advantage over another by false representations, suggestion or suppression of the truth or deliberate disregard or omission of the truth. Fraud is committed by deliberately misleading another by words, either oral or in writing, by act or by omission where there is a duty to speak. Thus, statements or half-truths or the concealment of material facts may constitute fraud under the law. That is, the scheme may be fraudulent even though no affirmative misrepresentation was made. Fraud thus may be proved through the defendants' intentional inaction or non-disclosure of material fact

> designed to create a false representation. Fraud is also not limited to deceit or misrepresentation. It includes overreaching, undue influence and other forms of misconduct.

A1415-16.

The Porros argue that these instructions were erroneous in several important respects. We find their arguments to be wholly without merit, however, and unworthy of a lengthy discussion. Suffice it to say that despite the Porros' attempts to show that the instructions contradict the case law in other circuits, much of the challenged language comes directly from our decision in *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987). Even if we agreed that the challenged instructions were contrary to the decision of another circuit, that decision would not be controlling here. *But cf. United States v. Norton*, 108 F.3d 133, 135 (7th Cir. 1997) (quoting *Goldblatt* for the definition of a scheme); *United States v. Britton*, 9 F.3d 708, 709 (8th Cir. 1993) (same); *United States v. Ragosta*, 970 F.2d 1085, 1090 (2d Cir. 1992) (same).

Challenging a portion of the mail-fraud instruction not recited here, the Porros also argue that the District Court erroneously instructed the jury that Joan Porro had a duty to disclose material facts to the relevant trust beneficiaries and their guardian. The District Court did not so instruct the jury, however. Rather the court left it to the jury to decide whether Joan Porro had a duty to disclose and, if so, whether she violated that duty. *See* J.A. at 1416.

The Porros also claim the District Court erred by instructing the jury that "an honest belief on the part of the defendant that a particular business venture was sound and would ultimately succeed would not in and itself constitute good faith . . . if in carrying out that venture, the defendant knowingly made false or fraudulent representations to others with a specific intent to deceive them." *See* J.A. at 1426.

The Porros argue that this instruction erroneously relieved the government of its burden of proving intent to harm. Again, however, they seek support in inapposite cases decided in other circuits while ignoring our own decisions. *See* Br. of J. Porro at 18 (citing *United States v. Rossomando*, 144 F.3d 197 (2d Cir. 1998)). Indeed, the facts in *Rossomando* are so markedly different from the facts at bar that the challenged instruction would not contradict its holding. More importantly, however, the District Court's good-faith instruction is entirely consistent with the law of this circuit. *See United States v. Boyer*, 694 F.2d 58, 60 (3d Cir. 1982) (upholding jury charge that "[n]o amount of honest belief that the enterprise would ultimately make money can justify baseless, false or reckless misrepresentations or promises" on the record before the trial court).

In short, we find sufficient evidence in the record to support the Porros' conviction on the three mail-fraud counts charged in the second superseding indictment. We also find the Porros challenges to the jury instructions on the mail fraud counts to be without merit. Accordingly, we will affirm the convictions.

2. The Money Laundering Charge

The Porros argue that the District Court erroneously relied on *United States v. Mankarious*, 151 F.3d 694 (7th Cir. 1998), when it instructed the jury that a mail fraud scheme "can create proceeds before the mailing ever takes place." *See* J.A. at 1418. As the Porros correctly note, we disagreed with the relevant portion of *Mankarious* in *United States v. Morelli*, 169 F.3d 798, 806 n.9 (3d Cir. 1999), a case decided just days before the District Court instructed the jury in this case. Accordingly, the Porros argue that their conviction for money laundering must be reversed and Count 4 dismissed.

The government concedes that if *Morelli* is applicable to the Porros's case, "the conviction on Count 4 cannot stand

and that Count should be dismissed." Appellee's Br. at 55. It "thus requests that [we] strike the conviction for Count 4 from both defendants' Judgements of Conviction and reduce each of their special assessments by $50." *Id.* The Porros, in turn, concede that their conviction on the money laundering count did not affect their respective sentences. And, despite their claims to the contrary, the evidence adduced to prove the money laundering count would have been introduced even in the absence of that count because it was also used to prove the mail fraud count. Accordingly, the District Court's failure to strike the money laundering count was harmless error with respect to the Porros' conviction for the other crimes with which they were charged. Therefore, although we will reverse the Porros' money laundering convictions, there is no need to remand this case to the District Court on the basis of that reversal.

3. Prosecutorial Comments

The Porros next argue that the District Court erred by permitting the prosecutor to: (1) comment on their failure to testify; (2) make inflammatory comments; and (3) express personal opinions concerning their guilt and bad character. Once more, we find the Porros arguments on these points to be so lacking in merit as to warrant nothing more than brief mention.

With respect to the Porros' contention that the prosecutor improperly commented on their failure to testify, we need only note that a review of the record reveals no improper comments. The comments at issue all went to what the Porros did and did not say in the course of acting as their own defense counsel in the case, not to their decisions regarding whether or not they would testify as witnesses on their own behalf. Similarly, the Porros claim that the prosecutor improperly expressed personal opinions regarding their guilt and bad character is unsupported. The record demonstrates that the comments in question related to the evidence that the

jury would and ultimately did hear. They did not express the prosecutor's own personal opinions.

Though virtually undeveloped, the Porros also appear to argue that the prosecutor's frequent reference to them as lawyers amounted to an improper appeal to societal disdain for lawyers in general. *See* Br. of J. Porro at 23-24. As the government correctly observes, however, the Porros' status as lawyers was directly linked to their ability to carry out the fraudulent schemes for which they were convicted. Their control over trust accounts, like their ability to create false legal documents intended to obscure their misconduct, depended on their occupational status. The challenged comments merely highlighted the link between the Porros' occupation and their ability to defraud their clients. They were not of a general and inflammatory nature as the Porros imply. Accordingly, none of the challenged statements, taken alone or cumulatively, warrant reversal of the Porros' conviction.

4. Denial of Severance

In a series of pretrial and trial motions, Joan Porro moved the District Court to sever her trial from that of her husband, Alfred. The District Court denied each severance motion and Joan appeals. She argues that the court erred by denying her severance motions because she and Alfred were improperly joined for trial, and because she was unfairly prejudiced as a result.

We review the joinder of two or more defendants under Federal Rule of Criminal Procedure 8(b) *de novo*, but our review of the District Court's denial of a motion for severance is for abuse of discretion only. *See United States v. Thornton*, 1 F.3d 149, 152 (3d Cir. 1993) (citing *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1993), *cert. denied*, 502 U.S. 925 (1991)). Joinder is proper where two or more defendants "are alleged to have participated in the same

act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). Moreover, "[s]uch defendants may be charged in one or more counts together or separately and *all of the defendants need not be charged in each count.*" *Id.* (emphasis added). Thus, Joan Porro's claim that joinder was improper because the indictment included several counts on which only Alfred was charged is clearly without merit. The only question, then, is whether the District Court abused its discretion by denying Joan's motions for severance pursuant to Rule 14 ("Relief from Prejudicial Joinder").

Rule 14 authorized the District Court to grant Joan's motion for severance if it appeared that she would be prejudiced by the joinder of her trial with Alfred's. *See* Fed. R. Crim. P. 14. Nevertheless, " 'a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.' " *Thorton*, 1 F.3d at 153 (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)). Joan Porro claims that she was prejudiced by joinder because the jury heard evidence of Alfred's "alleged bad character and bad prior acts . . . that would not have been admissible at a trial of Joan Porro alone." Br. of J. Porro at 27 (citing *United States v. Palma-Rudas*, 121 F.3d 841, 854 (3d Cir. 1997), *rev'd on other grounds*, 526 U.S. 275 (1999)).

Joan's arguments on this issue amount to nothing more than an unsupported claim that evidence of her husband's "bad character prior bad acts" created an unfair risk that the jury would find her guilty by association. As we have repeatedly noted, however, unfair prejudice is not created merely "'because all evidence adduced is not germane to all counts against each defendant.'" *Thornton*, 1 F.3d at 153 (quoting *Eufrasio*, 935 F.2d at 568). The mere fact that certain evidence of Alfred's guilt was not germane to Joan's

guilt does not mean that she was unfairly prejudiced as a result. Thus, the District Court did not abuse its discretion by determining that Joan Porro was not prejudiced by the joinder of her and Alfred's trial, and we will affirm its denial of her motion for severance.

5. The Use of Summary Charts and Witnesses

In the final issue raised in Joan Porro's Brief, the Porros argue that the District Court erred by: (1) allowing the prosecutor to employ charts "summarizing 10 simple documents" that did not require summary; and (2) allowing a summary witness to introduce "impermissible extrinsic evidence and personal opinions." Br. of J. Porro at 24. "To the extent the district court's admission of evidence was based on an interpretation of the Federal Rules of Evidence, our standard of review is plenary. "But we review the court's decision to admit the evidence if premised on a permissible view of the law for an abuse of discretion." *United States v. Pelullo*, 964 F.2d 193, (3d Cir. 1992) (citing *United States v. Furst*, 886 F.2d *558*, 571 (3d Cir.1989), *cert. denied*, 493 U.S. 1062 (1990)).

The District Court correctly concluded that summary charts and witnesses are admissible under Rule 1006 only if three conditions are satisfied: (1) the underlying evidence is voluminous; (2) the summary evidence is based on and limited to evidence otherwise properly admitted; and (3) the originals or duplicates are made available to all litigants for examination. *See* J.A. at 1128. The Porros argument on this point is cursory at best and, as a result, not entirely clear. *See* Br. of J. Porro at 28-29. In essence, however, they appear to be arguing that the District Court erred by concluding that the evidence summarized by the challenged charts was sufficiently voluminous. Once more, we find the argument without merit.

In objecting to the introduction of the summary charts at issue, the Porros claimed that some were based on too few exhibits to be considered voluminous. For instance, they objected that Government's Exhibit 25 only "involves 21 exhibits. It's nothing voluminous." *See* J.A. at 1272. Beyond this conclusory argument, the Porros offer no explanation of why the evidence contained in 21 exhibits cannot be sufficiently voluminous that its summary would aid the jury. More importantly, however, the District Court concluded that it was inaccurate to evaluate the volume of the underlying evidence merely by counting the number of exhibits on which each summary chart was based, because many of the exhibits actually contained voluminous documents. Nothing in the record indicates that the District Court's conclusion was erroneous, and we cannot find an abuse of discretion in its decision to admit the summary charts.

The Porros' arguments concerning the summary witness, which might fairly be described as an exercise in obfuscation, fare no better. For instance, they claim that the "summary witness was used as a weapon to bring hearsay, illegally seized documents, impermissible extrinsic prejudicial evidence and personal opinions about the intent of defendants to the jury over the objections [sic]." Br. of J. Porro at 29 (citing App. 1215-16). Yet nowhere in the cited record did the Porros object to the summary witness' testimony on the basis of hearsay, or impermissible extrinsic prejudicial evidence. The only objections, raised by Alfred Porro, questioned the challenged testimony's relevancy, claimed that it injected improper opinion, and argued that it was expert rather than summary in nature. *See* J.A. at 1216 (Tr. 2620:6-11)). We find no error in the District Court's conclusion that the evidence was relevant, and that the witness' expertise was raised for the limited purpose of establishing his qualifications to summarize it. The Porros do not explain, nor does our review of those portions of the

record to which they direct our attention reveal, how the evidence injected improper personal opinion. *See* Br. of J. Porro at 29-30 (citing J.A. at 1205-08, 1215-16). Nor do we find any basis for concluding that the summary witness's testimony introduced hearsay, illegally seized documents, or impermissible extrinsic evidence.

The Porros also complain that the "prosecutor even admitted to 'summarizing' the summary witness which was objected to by counsel." Br. of J. Porro at 30. They fail to note, however, that the prosecutor withdrew the comment immediately. They also complain that "[a]t one point the 'summary' witness was allowed to opine as to the sufficiency of the evidence," *id.*, yet fail to acknowledge that the opinion was given on re-direct after the Porros had challenged the sufficiency of the evidence on cross examination.

Finally, the Porros complain that the "trial court did not give the required limiting instruction to the jury that the testimony of the summary witness is explanatory and not itself substantive evidence." *Id.* Yet they fail to mention that the District Court provided the jury with extensive limiting instructions regarding its use of the summary charts themselves, which were merely presented through the summary witness. Indeed, the very case the Porros cite for the proposition that failure to provide a limiting instruction concerning a summary witness is reversible error, found no such error where the trial court gave a limiting instruction concerning the jury's reliance on summary charts. *See United States v. Paulino*, 935 F.2d 739, 753 (6th Cir. 1991), *cert. denied*, 502 U.S. 914 (1991). In short, we can find no abuse of discretion in the District Court's admission of summary evidence, nor any error in its instructions concerning the use of such evidence. Accordingly, we will affirm the District Court on this issue.

B. Issues Raised in Brief of Alfred Porro

1. Waiver of Fourth and Sixth Amendment Rights

The Porros claim, as they did throughout the proceedings below, that the government illegally seized and reviewed documents protected by the attorney-client privilege. On appeal, they argue that the District Court erred by ruling that they waived their Fourth and Sixth Amendment challenges to the seizure, and by finding that the prosecution did not review documents protected by the attorney-client privilege. The record is clearly to the contrary, however. From the initial planning stages, to the conduct of the search to subsequent efforts to identify and segregate potentially privileged documents, the government took great pains to avoid violating the attorney-client privilege. And, at every stage of the process, the Porros either refused to cooperate or engaged in dilatory practices that needlessly delayed the resolution of their privilege claims.

Nevertheless, the record demonstrates that through its own efforts and its eventual resort to the District Court, the government successfully shielded all privileged documents from prosecutorial review. The Porros cite no evidence to the contrary, but merely ask us to assume that the record is unreliable, that the government is lying, that the District Court erred, and that the prosecution did have access to and did review privileged documents. We will not entertain any such assumption, particularly in light of extensive evidence that it is entirely unfounded. *See* Dist. Ct. Order of 03/04/1998 at 23-25 (J.A. at 61-63). In short, we find no merit in the Porros' unsupported arguments and allegations, and will affirm the District Court's ruling that the Porros' Fourth and Sixth Amendment rights were not violated.

2. The Sealed Indictments

As previously noted, the initial, four-count indictment filed against the Porros on July 26, 1996, remained under seal until it was superseded by a sealed, seventeen-count indictment on December 13, 1996. The superseding indictment was unsealed on December 17, 1996. A second superseding indictment was filed on July 11, 1997. The Porros argue that the District Court should have, but erroneously failed to, dismiss the indictment on several grounds.

The Porros first argue that Criminal Rule of Procedure 6(e)(4) permits the sealing of an indictment only "until the defendant is in custody or has been released pending trial." They further argue that "[a]n extensive charting of the cases . . . demonstrates that no Court has extended sealing for generic non-custodial 'law enforcement and public policy concerns' alone." Br. of A. Porro at 19 (quoting J.A. 427-36). We have previously noted, however, that "[a]n indictment may be sealed for any legitimate law enforcement reason or where the public interest requires it." *United States v. DiSalvo*, 34 F.3d 1204, 1218 (3d Cir. 1994) (citing *United States v. Michael*, 180 F.2d 55 (3d Cir. 1949), *cert. denied*, 339 U.S. 978 (1950)) (other citations omitted). Thus, the Porros' narrow construction of Rule 6(e)(4) is unfounded.

The Porros next argue that the indictment should have been dismissed because "[a]n improper sealing of an indictment violates the Speedy Trial Act when 140 days elapsed without a trial." They also appear to argue that because the indictment was improperly sealed, it did not toll the statute of limitations on the crimes with which they were charged. Obviously, these arguments fail where, as here, the indictment was not improperly sealed. *See id.* (noting that the "general rule is that the statute of limitations ceases to run when an indictment is returned to the district court notwithstanding the fact that it is subsequently sealed and

may not have been known to the defendant for sometime thereafter.") (citation omitted).

In their final argument on this issue, the Porros contend that the indictment should have been dismissed "based on prosecutorial misrepresentations to the Court of 'prematurity' of challenge, 'no prejudice' in that 'no indictment' had been returned." Br. of A. Porro at 20. Yet they make no attempt to explain their allegations of misrepresentation and we are not in a position to divine their legal theories from thin air. We will affirm the District Court's denial of the Porros' motion to dismiss the indictment.

3. Failure to Give Special Unanimity Instructions

At trial, the Porros proposed that the jury be given a special unanimity instruction concerning the conspiracy charge against them (Count 5 of the Second Superseding Indictment). Specifically, they proposed that the jury be instructed that it was required to "unanimously agree that the same overt act was committed" in furtherance of the charged conspiracy. The District Court denied the request and the Porros appeal. Although they did not request it below, they also argue that the District Court erred by failing to give the jury a special unanimity charge on Counts 6 through 14 (making false statements to lenders), and Counts 16-19 (subscribing to false tax returns).

Though they fail to offer much explanation, the Porros rely on *Richardson v. United States*, 526 U.S. 813 (1999) for the proposition that special unanimity instructions were required in their case. In *Richardson*, the Court held that when an alleged act is an element of the charged crime, the jury must unanimously find that the defendant committed that act. *Id.* at 818; *see also United States v. Edmonds*, 80 F.3d 810 (3d Cir. 1996) (en banc) (holding same). If, on the other hand, an alleged act is merely one of several possible means by which

the defendant could have committed a particular element of the crime, jury unanimity is not required. *See Richardson*, 526 U.S. at 817; *see also United States v. Yeaman*, 194 F.3d 442, 453 (3d Cir. 1999), *cert. denied*, *Rennert v. United States*,—S. Ct.—, 2000 WL 462382 (May 22, 2000). In other words, the jurors need only unanimously agree that the defendant committed *some* act that was a means of satisfying the element in question. They need not unanimously agree on the specific act.

> Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude that he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the government has proved the necessary element, namely that the defendant had threatened force ...

Richardson, 526 U.S. at 817.

In this case, conviction on the conspiracy charge required only that the jurors unanimously agree that at least one of the Porros took at least one affirmative act in furtherance of the conspiracy. Unanimous juror agreement concerning the identity of the affirmative act itself was not required. Thus, the District Court was not required to provide the jury with a special jury instruction as the Porros claim. Instead, the court was only required to provide a general unanimity instruction, *see Yeaman*, 194 F.3d at 453, which it did. *See* J.A. at 1428.

As with the conspiracy charge, the "full potpourri of alternatives," Br. of A. Porro at 21, relating to the false statement counts, as well as the "menu of alternative specific" false items, *id.* at 22, relating to the false tax return counts, were merely alternative means of committing the underlying criminal elements. Thus, the District Court's use of a general

rather than a special unanimity charge was sufficient, and will be affirmed.

4. Exclusion of Defense Witnesses

As part of their defense, the Porros proffered the testimony of several different witnesses held up as experts in the fields of tax, document authentication, and real estate appraisal. The District Court precluded the proffered testimony as a sanction for the Porros' failure to comply with the rules of discovery. *See* Fed. R. Crim. P. 16(d)(2) (authorizing the trial court to prohibit a party from introducing evidence it has wrongly withheld from discovery). The Porros claim that the District Court's preclusion order violated their Sixth Amendment right to offer favorable witnesses. *See* Br. of A. Porro (citing *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988)). Once more, however, their argument is belied by the very case on which they purport to base it.

In *Taylor*, the Court held that a defendant's Sixth Amendment right to present exculpatory evidence is not unlimited, *see id.* at 410-11, and that preclusion of defense evidence can be an "entirely proper method of assuring compliance with" a discovery order. *Id.* at 412 (internal quotation marks and citation omitted). The record in this case demonstrates that the Porros repeatedly failed to comply with their pretrial discovery obligations, and continued to do so for at least seven weeks into the trial, a point at which the prosecution had already presented the bulk of its case. Viewed in this light, we cannot conclude that the District Court abused its discretion by concluding that preclusion of the Porros' expert witnesses was necessary to prevent undue prejudice to the prosecution. Accordingly, we will affirm the District Court's decision to preclude the witnesses at issue.

5. Alleged Sentencing Errors

In the final issue raised in this appeal, the Porros claim that the District Court "erred in total adoption of prosecution

probation report." Br. of A. Porro at 27. As an initial matter, we assume that they are referring to their Presentence Investigation Reports rather than "probation reports." In any event, although the Porros claim that the District Court committed no less than six separate errors, they have failed to support those claims with any argument whatsoever. As we have repeatedly noted, "absent extraordinary circumstances, briefs must contain statements of all issues presented for appeal, *together with supporting arguments and citations*." *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1065 (3d Cir. 1991), *cert. denied*, 503 U.S. 985 (1992); *see also Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993).

Although the bulk of the Porros' arguments on the issues raised in their respective briefs have relied on little more than conclusory claims and vague references. No doubt we have been overkind in our willingness to address the issues raised despite the Porros' own reluctance to assert much more than empty rhetoric on their own behalf.[3] Here, however, what the

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[3] The Porros claim that the relative paucity of legal analysis and factual support in their briefs results from their good-faith compliance with the page limitations established by the rules of this court. *See* Reply Br. of J. Porro at 1-2. That claim, however, not only ignores the reality of this appeal, it reflects the Porros' consistent inability to accept responsibility for their own decisions. It ignores, for instance, the fact that although the issues raised in the Porros' respective appeals are virtually identical, they were able to divide those issues between two separate briefs. As a result, they had twice the space for constructing their arguments that they would have had if required to discuss each issue individually. It also ignores the Porros' own decision to assert every possible issue on appeal, no matter how frivolous, rather than focusing on those issues of arguable merit. Additionally, it ignores the Porros' decision to devote space in their briefs to discussions of non-binding decisions reached in inapposite cases, rather than focus on the law of this circuit and the facts of their own case. In short, although we find no valid excuse for the Porros' failure to present intelligible arguments, we have been more than generous in our attempts to address those arguments nonetheless. We draw the line, however, where we can identify no argument at all.

government quite aptly describes as the Porros' "scattershot attack" on their sentences, wholly devoid of legal argument beyond self-serving, conclusory statements, exceeds even our own patience and generous indulgence. We neither can nor will construct the Porros' arguments for them, nor weed through the voluminous record in the absence of any guiding citations. Accordingly, we deem the Porros' to have waived their challenges to their respective sentences, and will affirm the sentences entered by the District Court.

III. Conclusions

As the government requests, we will reverse the Porros' conviction on the money laundering count charged in their second superseding indictment. We find the Porros' arguments on all other issues raised in their respective briefs to be without merit, and will affirm the District Court in all respects other than the money laundering conviction.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Richard L. Nygaard
RICHARD L. NYGAARD
Circuit Judge

APPENDIX B

UNREPORTED—NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-5278 and 99-5369

UNITED STATES OF AMERICA

v.

ALFRED A. PORRO, JR.,
Appellant at 99-5278

UNITED STATES OF AMERICA

v.

JOAN ATKINS PORRO,
Appellant at 99-5369

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil Nos. 96-cr-00420-1 and 96-cr-00420-2)
District Judge: Honorable Joseph H. Rodriguez

Submitted Under Third Circuit LAR 34.1(a)
June 1, 2000

BEFORE: SCIRCA, and NYGAARD, *Circuit Judges*, and POLLAK, *District Judge*.[1]

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on June 1, 2000.

On consideration whereof it is now ordered and adjudged by this court that the judgments of the District Court entered on March 22, 1999, hereby AFFIRMED.

ATTEST:

_____

Acting Clerk

Dated: 22 August 2000

[1] The Honorable Louis H. Pollak, District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

[Filed Oct. 14, 1999]

UNITED STATES DISTRICT COURT
District of New Jersey

Case Number CR 96-00420-01 (JHR)

UNITED STATES OF AMERICA

v.

ALFRED A. PORRO, JR.

Defendant.

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

The defendant, ALFRED A. PORRO, appeared pro se, having waived counsel.

On motion of the United States the court has dismissed the superseding indictment and the original indictment.

The defendant was found guilty of counts 1 thru 14 & 16 thru 18 of the nineteen-count second superseding indictment by a jury verdict on 3/18/99 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Numbers
18 USC 1341	Frauds and Swindles (mail fraud)		1 thru 3
18 USC 1957-9992	Engaging in monetary transactions (money laundering)		4
18 USC 371	Conspiracy to obstruct justice		5
18 USC 1014 & 2	Loan and credit applications, false statements to bank		6 thru 10
18 USC 1014 & 2	Loan and credit applications, false statements to bank		11 and 12
18 USC 1014 & 2	Loan and credit applications, false statements to bank		13 and 14
26 USC 7206(1)	Fraud and False statements (false subscription)		16 thru 18

As pronounced on 10/12/99, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $850.00, for counts 1 thru 14 & 16 thru 18, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 14th day of October, 1999.

/s/ Joseph H. Rodriguez
Joseph H. Rodriguez
United States District Judge

Defendant's SSAN: 136-26-2289
Defendant's Date of Birth: 03/14/35
Defendant's address: 200 Burton Avenue,
Hasbrouck Heights, NJ 07604

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 70 months. This shall consist of terms of 70 months on Counts four, and six through fourteen, and 60 months on Counts one, two, three, five and sixteen through eighteen, all said terms to run concurrently to each other.

The defendant is remanded to the custody of the United States Marshals.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five (5) years. This term consists of terms of 5 years on each of Counts six through fourteen and terms of three years on each of Counts one through five and sixteen through eighteen, all such terms to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

> Based on information presented, the defendant is excused from the mandatory drug testing provision, however, may be requested to submit to drug testing during the period of supervision if the probation officer determines a risk of substance abuse.
>
> If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
>
> If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

> The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

The defendant is to fully cooperate with the Internal Revenue Service by filing all delinquent or amended returns within six months of the sentence date and to timely file all future returns that come due during the period of probation. The defendant is to properly report all correct taxable income and claim only allowable expenses on those returns. The defendant is to provide all appropriate documentation in support of said returns. Upon request, the defendant is to furnish the Internal Revenue Service with information pertaining to all assets and liabilities, and the defendant is to fully cooperate by paying all taxes, interest and penalties due, and otherwise comply with the tax laws of the United States.

The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine or restitution obligation. The defendant shall not encumber or liquidate interest in any assets unless it is in direct service of the fine or restitution obligation or otherwise has the express approval of the Court.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Mary Galofaro 427 Van Houton Street Passaic, New Jersey 07055	$25,000.00
Margaret Helstoski 16 Twin Brook Road Saddle River, New Jersey 07459	$100,000.00
Bank of New York 385 Rifle Camp Road West Paterson, New Jersey 07424	$208,661.00

Any payment made that is not payment in full shall be distributed prorata.

The defendant's restitution obligations shall be offset by any restitution payments made by related defendants in this case. The restitution shall be due and payable immediately. Any unpaid balance shall be paid as a condition of Supervised Release. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except: The Court determines that the total tax loss for guideline purposes is $331,844.00. This finding does not alter the total offense level.

Guideline Range Determined by the Court:

Total Offense Level:	27
Criminal History Category:	I
Imprisonment Range:	70 to 87 months
Supervised Release Range:	3 to 5 years
Fine Range:	$12,500 to $1,000,000
Restitution:	$333,633.00

The Fine is waived or is below the guideline range, because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

APPENDIX D

[Filed Oct. 14, 1999]

UNITED STATES DISTRICT COURT
District of New Jersey

Case Number CR 96-00420-02 (JHR)

UNITED STATES OF AMERICA

v.

JOAN ATKINS PORRO

Defendant.

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

The defendant, JOAN ATKINS PORRO, was represented by Michael A. Querques, Esquire.

On motion of the United States the court has dismissed the superseding indictment and the original indictment.

The defendant was found guilty of counts 1 thru 5 & 15 thru 19 of the nineteen-count second superseding indictment by a jury verdict on 3/18/99 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section	Nature of Offense	Date of Offense	Count Numbers
18 USC 1341	Frauds and Swindles (mail fraud)		1 thru 3
18 USC 1957-9992	Engaging in monetary transactions (money laundering)		4
18 USC 371	Conspiracy to obstruct justice		5
28 USC 7201	Attempt to evade or defeat tax		15
26 USC 7208(1)	Fraud and False statements (false subscription)		16 thru 18
26 USC 7201(1)	Fraud and False statements (partnership return)		19

As pronounced on 10/12/99, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $500.00, for counts 1 thru 5 & 15 thru 19, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 14th day of October, 1999.

/s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
United States District Judge

Defendant's SSAN: 143-40-0753
Defendant's Date of Birth: 07/02/47
Defendant's address: 200 Burton Avenue,
Hasbrouck Heights, NJ 07604

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 57 months. This shall consist of terms of 57 months on Count four, and 57 months on Counts one, two, three, five and fifteen through nineteen, all such terms to run concurrently to each other.

The defendant is remanded to the custody of the United States Marshals.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three (3) years. This term consists of terms of 3 years on each of Counts one through five and fifteen through nineteen, all such terms to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court (set forth below):

> Based on information presented, the defendant is excused from the mandatory drug testing provision, however, may be requested to submit to drug testing during the period of supervision if the probation officer determines a risk of substance abuse.
>
> If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
>
> If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

and shall comply with the following additional conditions:

> The defendant shall provide the U.S. Probation Office with full disclosure of his financial records to include yearly income tax returns upon the request of the U.S. Probation Office. The defendant shall cooperate with the probation officer in the investigation of his financial dealings and shall provide truthful monthly statements of his income.

The defendant is to fully cooperate with the Internal Revenue Service by filing all delinquent or amended returns within six months of the sentence date and to timely file all future returns that come due during the period of probation. The defendant is to properly report all correct taxable income and claim only allowable expenses on those returns. The defendant is to provide all appropriate documentation in support of said returns. Upon request, the defendant is to furnish the Internal Revenue Service with information pertaining to all assets and liabilities, and the defendant is to fully cooperate by paying all taxes, interest and penalties due, and otherwise comply with the tax laws of the United States.

The defendant is prohibited from incurring any new credit charges or opening additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with a payment schedule for any fine or restitution obligation. The defendant shall not encumber or liquidate interest in any assets unless it is in direct service of the fine or restitution obligation or otherwise has the express approval of the Court.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Mary Galofaro 427 Van Houton Street Passaic, New Jersey 07055	$25,000.00
Margaret Helstoski 16 Twin Brook Road Saddle River, New Jersey 07459	$100,000.00

Any payment made that is not payment in full shall be distributed prorata.

The defendant's restitution obligations shall be offset by any restitution payments made by related defendants in this case. The restitution shall be due and payable immediately. Any unpaid balance shall be paid as a condition of Supervised Release. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

STATEMENT OF REASONS

The court adopts the factual finding and guideline application in the presentence report except: The Court determines that the total tax loss for guideline purposes is $331,844.00. This finding does not alter the total offense level.

Guideline Range Determined by the Court:

Total Offense Level:	25
Criminal History Category:	I
Imprisonment Range:	57 to 71 months
Supervised Release Range:	2 to 3 years
Fine Range:	$10,000 to $100,000
Restitution:	$125,000.00

The Fine is waived or is below the guideline range, because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

APPENDIX E

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5278

THE UNITED STATES OF AMERICA

v.

ALFRED A. PORRO JR.,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 96-cr-00420-1)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, SCIRICA, NYGAARD,
ALITO, ROTH, MCKEE, RENDELL, BARRY, and
AMBRO, *Circuit Judges* and POLLAK, *District Judge*[*]

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

---

[*] Vote limited to panel rehearing only.

It is so ordered.

By the Court,

/s/ [Illegible]
United States Circuit Judge

DATE: Oct. 25, 2000

Ch/cc: ALP
GSL
ESF

APPENDIX F

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 99-5369

THE UNITED STATES OF AMERICA

v.

JOAN PORRO,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civ. No. 96-cr-00420-2)

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRCA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AND AMBRO, *Circuit Judges* and POLLAK, *District Judge*[*]

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

[*] Vote limited to panel rehearing only.

It is so ordered.

By the Court,

/s/ [Illegible]
United States Circuit Judge

DATE: Oct. 25, 2000

Ch/cc: JAP
GSL
ESF

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Criminal No. 96-420 (JHR)

UNITED STATES OF AMERICA

v.

ALFRED A. PORRO, JR. AND JOAN ATKINS PORRO

Title 18, United States Code, Sections 371, 1014, 1341, 1957 and 2; Title 26, United States Code, Sections 7201 and 7206(1).

SUPERSEDING INDICTMENT

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges :

COUNTS 1-3
(Mail Fraud)

1. At all times relevant to this Indictment:

(a) Defendants ALFRED A. PORRO, JR. and JOAN ATKINS PORRO were attorneys admitted to practice law in the State of New Jersey. Defendants were partners in the law firm of Porro & Porro in Lyndhurst, New Jersey.

(b) Defendants ALFRED A. PORRO, JR. and JOAN ATKINS PORRO were partners in and controlled the affairs of Riverview Associates, L.P. ("Riverview Associates"), a limited partnership formed under New Jersey law. Riverview Associates was a real estate development partnership which owned a tract of land in the Meadowlands area of Northern New Jersey.

(c) Defendant ALFRED A. PORRO, JR. was a shareholder in and controlled the affairs of L.T./A.P. Enterprises, Inc. ("L.T./A.P."), a corporation formed under New Jersey law. L.T./A.P. was formed, in part, to construct a golf driving range known as the Lawrence Taylor Golf Center located on the real property owned by Riverview Associated.

(d) In or around 1984, defendant JOAN ATKINS PORRO was named as trustee to administer a trust created by a person known to the Grand Jury for that person's two minor children (the "Trust"). As trustee, defendant JOAN ATKINS PORRO had certain duties and obligations to the Trust beneficiaries, including the duty to manage, prudently invest and safeguard Trust funds and to refrain from self-dealing, conversion and other wrongful acts. Defendant JOAN ATKINS PORRO provided periodic reports of accountings of the Trust funds to the beneficiaries identifying the nature and performance of Trust investments

Defendants' Scheme

2. Between in or around May 1989 and in or around February 1995, in the District of New Jersey, and elsewhere, the defendants

ALFRED A PORRO, JR. and
JOAN ATKINS PORRO

and others did knowingly and willfully devise and intend to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, which scheme is described in paragraphs 3 through 11 below.

3. The object of defendants' scheme was to divert Trust funds arid to use those diverted funds for defendants' own benefit.

The Riverview Associates Transaction

4. It was part of the scheme that on or about May 1, 1989, defendants ALFRED A. PORRO, JR. and JOAN ATKINS PORRO caused $176,000 to be transferred by check from a bank account holding the Trust funds to a third party to whom the defendant ALFRED A. PORRO owed a debt. The transfer was made without prior notice to the Trust beneficiaries. The defendant JOAN ATKINS PORRO later advised the Guardian of the Trust beneficiaries that she had invested the money into Riverview Associates without disclosing the defendants' interest in this limited partnership.

5. It was further part of the scheme that on or about February 23, 1990, defendant JOAN ATKINS PORRO, responding to a complaint from the beneficiaries' guardian about the speculative nature of this purported investment in Riverview Associates, caused a letter to be sent to the beneficiaries' guardian which was false and misleading in at least the following respects:

(a) Defendant JOAN ATKINS PORRO failed to disclose that she and her husband had a financial interest in and controlled the affairs of Riverview Associates; and

(b) Defendant JOAN ATKINS PORRO stated that she would remove the Trust funds from Riverview Associates, when in fact she did not intend to—and did not—remove the funds.

The L.T./A.P. Transaction

6. It was further part of the scheme that on or about July 27, 1991, defendant ALFRED A. PORRO, JR. caused a check to be drawn on the L.T./A.P. checking account in the amount of $100,000 made payable to a contractor who provided construction services on behalf of L.T./A.P. in connection with the Lawrence Taylor Golf Center. As of the date this check was written, the L.T./A.P. checking account did not have sufficient funds to cover the $100,000 check.

7. It was further part of the scheme that on or about July 31, 1991, defendants ALFRED A. PORRO, JR. and JOAN ATKINS PORRO converted to their own use $100,000 of Trust funds by transferring that amount to checking account of L.T./A.P. to cover the previously issued $100,000 check.

8. It was further part of the scheme that defendant JOAN ATKINS PORRO wrongfully and in violation of her duty as trustee, failed to disclose to the Trust beneficiaries the transfer of these Trust funds to financial ventures in which the Porros held a personal financial interest.

9. It was further part of the scheme that on or about February 11, 1992, February 24, 1993 and February 4, 1994, defendant JOAN ATKINS PORRO caused to be sent to the Trust beneficiaries purported Trust accountings. In each of these accountings, defendant JOAN ATKINS PORRO failed to disclose the transfer of the Trust funds to L.T./AP.

10. It was further part of the scheme that on or about February 22, 1995, defendant JOAN ATKINS PORRO sent a letter to the Trust beneficiaries' guardian advising her for the first time that she had invested money in L.T./A.P. and that the "investment" had paid off, when in fact the defendants had repaid the money from their own personal funds.

11. On or about the dates listed below, for the purpose of executing and attempting to execute this scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, defendants

ALFRED A. PORRO, JR. and
JOAN ATKINS PORRO

knowingly and willfully placed and caused to be placed in a post office and authorized depository for mail, and caused to be delivered by mail according to the directions thereon, certain mail matter, to be delivered by the United States Postal Service, as follows:

Count	Mailing
1	Feb. 11, 1992 letter from defendant JOAN ATKINS PORRO to beneficiaries' guardian purporting to provide Trust accounting
2	Feb. 24, 1993 letter from defendant JOAN ATKINS PORRO to beneficiaries' guardian purporting to provide Trust accounting
3	Feb. 4, 1994 letter from defendant JOAN ATKINS PORRO to beneficiaries' guardian purporting to provide Trust accounting

In violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 4
(Money Laundering)

1. Paragraphs 1 and 3 through 10 of Counts 1 through 3 of this Indictment are realleged and incorporated herein.

2. On or about July 27, 1991 in the District of New Jersey, and elsewhere, the defendants

ALFRED A. PORRO, JR. and
JOAN ATKINS PORRO

did knowingly and willfully engage and attempt to engage in a monetary transaction in criminally derived property of a value greater than $10,000, such property having been derived from specified unlawful activity and such transfer having been made through financial institutions affecting interstate commerce, to wit, a transfer by check of $100,000 from the L.T./A.P. account at National Community Bank to the account of Oakridge General Contractor at Citizens First National Bank of New Jersey, the transferred funds having been derived from the crime of mail fraud.

In violation of Title 18, United States Code, Sections 1957(a) and 2.

COUNT 5
(Conspiracy to Obstruct Justice)

1. Paragraph 1 of Count One is realleged and incorporated herein.

2. At all times material to these allegations, an agency of the United States was assisting a federal grand jury in investigating, among other things, the personal finances of defendants ALFRED A. PORRO, JR. and JOAN ATKINS PORRO, their theft of the Trust funds, as described in Counts 1 through 4, and their noncompliance with federal tax laws.

3. From in or about at least June, 1994, to in or about February, 1995, in Bergen County in the District of New Jersey and elsewhere, the defendants

ALFRED A. PORRO, JR and
JOAN ATKINS PORRO

knowingly and wilfully combined, conspired, confederated and agreed to corruptly influence, impede and obstruct, and endeavor to corruptly influence, impede and obstruct, the due administration of justice in connection with the federal grand jury described in paragraph 2, contrary to Title 18, United States Code, Section 1503.

4. It was a part of the conspiracy that the defendants attempted to mislead the grand jury and federal agents investigating the defendants by failing to produce documents responsive to the grand jury's subpoenas.

5. It was further a part of the conspiracy that the defendants attempted to disguise their theft of the Trust funds as legitimate investments by creating phony, backdated agreements which purported to secure the Trust funds taken by the defendants.

6. It was further part of the conspiracy that the defendants made false statements to the guardian of the beneficiaries of

the stolen Trust funds designed to disguise the theft of the Trust funds as business investments.

7. It was further part of the conspiracy that the defendants made false statements to federal agents designed to mislead them and the grand jury.

Overt Acts

In furtherance of the conspiracy and to effect the objects thereof, the defendants ALFRED A PORRO, JR. and JOAN ATKINS PORRO committed the following overt acts in the District of New Jersey and elsewhere:

1. On or about June 2, 1994, the defendant JOAN ATKINS PORRO received a federal grand jury subpoena calling for the production of all documents relating to the Trust described in Counts 1 through 4. On or about June 14, 1994, the defendant ALFRED A. PORRO, JR. responded to the grand jury subpoena by producing certain documents while failing to include all documents in the possession of the defendants responsive to the subpoena.

2. In or about August, 1994, defendants ALPRED A. PORRO, JR. and JOAN ATKINS PORRO caused the creation of a phony backdated agreement to be issued by the Lawrence Taylor Golf Center in an attempt to disguise the theft of the Trust funds as described in Counts 1 through 4.

3. On or about February 22, 1995, the defendant JOAN ATKINS PORRO sent a letter to the guardian of the two minor children whose Trust moneys had been stolen falsely stating that the "investment" had paid off when in fact the defendants had used personal assets to repay the money after records relating to the Trust funds had been subpoenaed by a federal grand jury.

4. On or about February 24, 1995, defendant ALFRED A. PORRO, JR. met with federal authorities and made numerous materially false and misleading statements designed to mislead investigators and the grand jury.

In violation of Title 18, United States Code, Section 371.

COUNTS 6-10

(False Statements to Midlantic Bank—Porro & Porro)

1. Paragraph 1 of Count 1 of this indictment is realleged and incorporated herein.

2. At all relevant times, Midlantic National Bank ("Midlantic"), located in Westfield, New Jersey, was a financial institution whose deposits were insured by the Federal Deposit Insurance Corporation ("FDIC").

3. Since in or about 1978 defendant ALFRED A. PORRO, JR. and later the law firm of Porro & Porro maintained a revolving line of credit loan at Midlantic Bank intended to provide working capital for his law practice. The loan was periodically renewed and from time to time increased.

4. In order to induce Midlantic to issue and renew the loan, defendant ALFRED A. PORRO, JR. submitted to the bank a personal guarantee.

5. In order to induce Midlantic to issue and renew the loan, defendant ALFRED A. PORRO, JR. submitted to the bank a document purporting to be a personal guarantee of his law partner and spouse, JOAN ATKINS PORRO.

6. In order to induce Midlantic to issue and renew the loan, defendant ALFRED A. PORRO, JR. also submitted to the bank financial statements purportedly representing his true annual income, assets and liabilities.

7. On or about the dates listed below, at Bergen County, in the District of New Jersey and elsewhere, the defendant

ALFRED A. PORRO, JR.

for the purpose of influencing in any way the action of Midlantic, regarding an application for credit and a renewal of extension of credit by Midlantic, whose accounts were

insured by the FDIC, knowingly made false statements on the following documents, which were submitted to Midlantic on or about the dates set forth below:

Count	Date	False Statememt
6	March, 1987	1987 Personal Financial Statement of Alfred A. Porro, Jr.
7	March 14, 1988	Personal Guarantee of Joan Atkins Porro
8	December 4, 1989	1989 Personal Financial Statement of Alfred A. Porro, Jr.
9	October 1, 1990	1990 Personal Financial Statement of Alfred A. Porro, Jr.
10	March, 1992	1992 Personal Financial Statement of Alfred A. Porro, Jr.

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNTS 11-12

(False Statements to Midlantic Bank—Dineco, Inc.)

1. Paragraph 1 of Count 1 of this Indictment is realleged and incorporated herein.

2. At all relevant times, Midlantic National Bank ("Midlantic"), located in Clifton, New Jersey, was a financial institution whose deposits were insured by the Federal Deposit Insurance Corporation ("FDIC").

3. At all relevant times, Dineco Inc. ("Dineco"), located at 185 Rt. 17 in East Rutherford, New Jersey, was a corporation engaged in the restaurant business that operated under the trade name LT's Sports Pub.

4. At all relevant times, defendant ALFRED A. PORRO, JR. held an equitable or ownership interest in Dineco and was an officer of the corporation.

5. On or about March 20, 1990, Midlantic Bank approved a loan in the amount of $200,000 to Dineco to be used for restaurant renovations and operating capital.

6. In order to induce Midlantic to issue and renew the loan, defendant ALFRED A. PORRO, JR. submitted to the bank a personal guarantee.

7. In order to induce Midlantic to issue and renew the loan, defendant ALFRED A. PORRO, JR. also submitted to the bank financial statements purportedly representing his true annual income, assets and liabilities.

8. On or about the dates listed below, at Bergen County, in the District of New Jersey and elsewhere, the defendant

ALFRED A. PORRO, JR.

for the purpose of influencing in any way the action of Midlantic, regarding an application for credit and a renewal of extension of credit by Midlantic, whose accounts were insured by the FDIC, knowingly made false statements on the following documents, which were submitted to Midlantic on or about the dates set forth below:

Count	Date	False Statememt
11	February, 1990	1990 Personal Financial Statement of Alfred A. Porro, Jr.
12	March 3, 1992	1992 Personal Financial Statement of Alfred A. Porro, Jr.

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNTS 13-14

(False Statements to National Community Bank—Riverview Associates)

1. Paragraph 1 of Count 1 of this Indictment is realleged and incorporated herein.

2. At all relevant times, National Community Bank ("NCB"), located in West Paterson, New Jersey, was a financial institution whose deposits were insured by the Federal Deposit Insurance Corporation ("FDIC").

3. On or about February 10, 1989, NCB approved a loan to Riverview Associates in the amount of $850,000 in order to facilitate the development of a tract of land located in the Meadowlands and owned by Riverview Associates.

4. In order to induce NCB to issue and renew the loan, defendant ALFRED A. PORRO, JR. submitted to the bank a personal guarantee.

5. In order to induce NCB to issue and renew the loan, defendant ALFRED A. PORRO, JR. also submitted to the bank financial statements purportedly representing his true annual income, assets and liabilities.

6. In order to induce NCB to renew the loan, defendant ALFRED A. PORRO, JR. also submitted to the bank a document purporting to be a personal guarantee of Lawrence Taylor.

7. On or about the dates listed below, at Bergen County, in the District of New Jersey and elsewhere, the defendant

ALFRED A. PORRO, JR.

for the purpose of influencing in any way the action of NCB, regarding a renewal of extension of credit by NCB, whose accounts were insured by the FDIC, knowingly made false statements on the following documents, which were submitted to NCB on or about the dates set forth below:

Count	Date	False Statememt
13	November 7, 1991	1991 Personal Financial Statement of Alfred A. Porro, Jr.
14	March 23, 1992	Personal Guarantee of Lawrence Taylor

In violation of Title 18, United States Code, Sections 1014 and 2.

COUNT 15

(Tax Evasion)

1. Paragraph 1 of Count 1 is realleged and incorporated herein.

2. On or about October 17, 1990, defendant JOAN ATKINS PORRO caused the filing of a 1989 United States Joint Individual Income Tax Return Form 1040 on behalf of herself and her spouse. The return revealed an outstanding tax due and owing of approximately $23,584.00. Despite the outstanding balance, no payments were made.

3. On or about June 18, 1991, the Internal Revenue Service levied on several bank accounts in the name of the defendant JOAN ATKINS PORRO.

4. On or about August 9, 1991, in an attempt to evade and defeat the payment of a substantial portion of the tax due and owing to the United States, defendant JOAN ATKINS PORRO caused an account to be opened at the National Community Bank under the name of a nominee and thereafter deposited her assets into the account.

5. On or about August 9, 1991, in the District of New Jersey, and elsewhere, defendant

JOAN ATKINS PORRO

did knowingly and willfully attempt to defeat the payment of a substantial part of the income tax due and owing by her to the United States for the calendar year 1989, in the amount of approximately $14,625, by placing funds in the name of a nominee, as described in paragraph 4 of this Count.

In violation of Title 26, United States Code, Section 7201 and Title 18, United States Code, Section 2.

COUNTS 16-18
(False Subscription—Personal Returns)

1. Paragraph 1 of Count 1 is realleged and incorporated herein.

2. On or about the dates listed below, defendants ALFRED A. PORRO, JR. and JOAN ATKINS PORRO made and subscribed to the below listed United States Joint Individual. Income Tax Returns, Form 1040, each such return having been verified by a written declaration that it was made under penalties of perjury and which they did not believe to be true and correct as to every material matter.

3. Each of the below listed tax returns was not true and correct as to every material matter in that the returns failed to report income from the defendants' law practice, other fees and payments, and misappropriated Trust funds in the respective tax years.

4. On or about the dates listed below, at Bergen County, in the District of New Jersey and elsewhere, defendants

ALFRED A. PORRO, JR. and
JOAN ATKINS PORRO

knowingly and wilfully did make and subscribe to false returns as described in paragraph 2 of Counts 16 through 18, which they did not believe to be true and correct as to every material matter as described in paragraph 3 of Count 16 through 18:

Count	Date	Filing
16	4/8/92	1990 Joint Individual Income Tax Return, Form 1040
17	9/13/93	1991 Joint Individual Income Tax Return, Form 1040
18	9/14/94	1992 Joint Individual Income Tax Tax Return, Form 1040

In violation of Title 26, United States Code, Section 7206(1).

COUNT 19

(False Subscription—Partnership Return)

1. Paragraph 1 of Count 1 is realleged and incorporated herein.

2. On or about October 7, 1991, defendant JOAN ATKINS PORRO made and subscribed to a 1990 United States Partnership Tax Return, Form 1065, for the law partnership known as Porro & Porro, such return having been verified by a written declaration that it was made under penalties of perjury and which she did not believe to be true and correct as to every material matter.

3. The 1990 partnership return was not true and correct as to every material matter in that it failed to report additional gross receipts received and it failed to provide an accurate statement of the amount of profit and loss incurred in the tax year.

4. On or about October 7, 1991, at Bergen County, in the District of New Jersey and elsewhere, defendant

JOAN ATKINS PORRO

knowingly and wilfully did make and subscribe to a false 1990 United States Partnership Return, Form 1065, as described in paragraph 2 of this count, which she did not believe to be true and correct as to every material matter as described in paragraph 3 of this Count.

In violation of Title 26, United States Code, Section 7206(1).

A TRUE BILL

_____

FOREPERSON

/s/ _____

FAITH S. HOCHBERG
UNITED STATES ATTORNEY

APPENDIX H

NCIA
NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES
3125 MT. VERNON AVENUE
ALEXANDRIA, VIRGINIA 22305

SENTENCING REPORT

FOR

ALFRED & JOAN PORRO

SUBMITTED TO:

THE HONORABLE JOSEPH H. RODRIGUEZ
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN, NEW JERSEY

August 1999

NCIA
NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES

JEROME G. MILLER
PRESIDENT

HERBERT J. HOELTER
DIRECTOR

CONFIDENTIAL

August 5, 1999

The Honorable Joseph H. Rodriguez
United States District Court for the
District of New Jersey
Mitchell H. Cohen U.S. Courthouse
John F. Gerry Plaza, Room 6060
PO Box 886
Camden, New Jersey 08101

RE: *United States v. Alfred & Joan Porro*
Docket Nos. 98-00420-001, 002

Dear Judge Rodriguez:

The National Center on Institutions and Alternatives (NCIA) prepared the proceeding sentencing report on Alfred and Joan Porro. This report is intended to supplement the Presentence Investigation Report and provide the Court with information relevant to the background and character of the Porros in accordance with 18 USC § 3661. Respectftully, we are requesting a downward departure for the Defendants, and, thus, this report also attempts to assist the Court by providing information substantiating our positions.

NCIA is a private, nonprofit agency providing training, technical assistance, research, and direct services to criminal justice, juvenile justice, social service, and mental health organizations and client across the country. Since 1979, NCIA has provided direct sentencing assistance in over 8,000

cases for approximately 65 of the 95 federal district courts and to state courts in all 50 states, plus the District of Columbia. This assistance offers judges detailed, highly-structured, and individualized sentencing options which can be utilized in the sentencing of defendants. A more complete organizational profile is appended to this report as Appendix A.

Thank you for your consideration of this material.

Sincerely,

/s/ Joel A. Sickler
JOEL A. SICKLER
Director, Client Services

JAS:ab

Enclosures

cc: Alfred and Joan Porro, Esq.
Perry Carbone/Renee Bumb, Assistant United States Attorneys

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APPENDICES

SENTENCING REPORT FOR ALFRED AND JOAN PORRO

I. OVERVIEW

On July 11, 1997 a 19-count superceding Indictment was filed in U. S. District Court for the District of New Jersey charging Defendants Alfred A. Porro, Jr. and Joan Porro, husband and wife, with seventeen offenses and ten offenses, respectively. On March 17, 1999, following a trial by jury, they were convicted on all counts.

Counts One through Three charge the Defendants with obtaining money and property by means of false pretenses by causing certain mail matter to be delivered via the United States Mail in violation of 18 USC §§ 1341 and 2. The offense behavior involved moneys being taken from a trust fund, of which Joan Porro was administrator, and placed into projects in which Alfred Porro had an interest. The government characterized the Defendants' actions as "inappropriate", while they contended the transfers were mere "investments." Either way, the first transaction-$176,000 into Riverview Associates-arose in 1989 and the second-$100,000 into L.T./A.P. Enterprises, a business financing and constructing the Lawrence Taylor Golf Center on property owned by Riverview Associates—occurred in 1991. The $276,000 underlying these investments was taken from moneys being held in trust for two minors, a fund that Joan Porro oversaw at the behest of the boys' deceased father. These moneys were repaid in full, with interest.

Count Four charges the Defendants with engaging in a monetary transaction with criminally derived property valued at more than $10,000, in violation of 18 USC § 1957(a) and § 2. This count relates to the transfer, by check, of the $100,000 noted above from L.T./A.P. Enterprises to Oakridge Construction, the general contractor for the golf center.

Count Five charges that from June 1994 to February 1995, the Defendants conspired to impede and instruct the due

administration of justice in violation of 18 USC § 1503 and § 371. The Defendants were charged with a series of potential alternative overt acts: false statements to investigators, creation of a phony backdated agreement to be issued by the Lawrence Taylor Gold Center, and failure to produce certain documents to the grand jury pursuant to subpoena.

Counts Six through Fourteen charge Alfred A. Porro, Jr. with providing false financial statements to federally insured financial institutions between 1987 and 1992 in violation of 18 USC § 1014 and § 2.

Count Fifteen charges that on August 9, 1991, Joan Porro attempted to evade payment of the balance of personal income taxes due on the Defendants' 1989 return in the amount of $14,625 by opening an account in the name of a nominee in violation of 26 USC § 7201 and 18 USC § 2. When the IRS attempted to levy her personal bank accounts for payment, Mrs. Porro opened the account in her sister's name into which she deposited personal income and from which she paid the taxes and other expenses.

Counts Sixteen through Eighteen charge the Defendants with subscribing to false personal income tax returns for years 1990, 1991 and 1992 in violation of 26 USC § 7206(1). These returns failed to report all gross receipts from the Defendants' law practice.

Count Nineteen charges Joan Porro with subscribing to a false partnership tax return, Form 1065, for tax year 1990 in violation of 26 USC § 7206(1).

II. PERSONAL BACKGROUND OF ALFRED PORRO, JR.

Alfred Anthony Porro was born March 14, 1935 in Jersey City, New Jersey, the eldest of three children from the union of Alfred A. Porro, Sr. and the former Nancy Bongiovanni. The Defendant's father, now deceased, was born and raised in

Carlstadt, New Jersey. He spent more than 50 years at International Ticket Company in Newark, working first as a printer then print supervisor. Mrs. Porro, age 84, is a Hoboken native and one of nine children. She divided much of her adult life between assembly work at a clothing factory and caring for her children. She currently lives in West Paterson with her daughter.

The Defendant's siblings include Robert Porro, age 57, who lives in Cherry Hill and has worked in the restaurant business for much of his adult life. He is married and the father of five. Alfred's sister, Mary Lotito, age 48, lives in West Patterson with her mother, husband, and two children. She worked for the Defendant's law firm as a legal secretary for approximately 30 years, leaving only after the office closed due to charges surrounding the instant case.

A) Growing Up

By all accounts, Alfred's young life was a happy one. Shortly after marrying in 1934, his parents moved to East Rutherford, where he attended McKenzie Elementary School. Alfred has fond memories of his parents from that period, remarking that his father was a hard worker but extremely attentive to his children who made every effort to take part in activities with them. The family was deeply religious and attended services at Saint Joseph's Catholic Church for many years. As a youth, Alfred was also an active participant in the Boy Scouts who relished nature trips. From age 12, he was a paperboy and, by age 16, was managing all the paper carriers in Lyndhurst.

The Porros moved to Lyndhurst before Alfred's freshman year at Lyndhurst High School. He remembers being a "fair to good" student, making his mark as a student leader and musician. He was class president every year through high school and president of the student council for his senior year.

Alfred was also selected as the school's representative to Boy's State, an intensive ten-day course of government and constitutional issues hosted by Rutgers University.

Despite these many accomplishments, Alfred's greatest passion was music. His father played the violin and pressured Alfred to do likewise. However, he chose the trumpet for which he had greater aptitude. While he studied under a tutor, Alfred was largely self-taught. His proficiency earned him a spot in the high school band, and he occasionally played professionally. He sat in with dance or swing orchestras, performing in the Catskills and at Bar Mitzvahs and weddings.

In fall 1952, Alfred took his love for music to Rutgers University's Newark campus. Although he chose Rutgers for financial reasons—he could live at home and attend as an in-state student—Alfred played engagements with area bands to help cover costs. He pursued his interest in government and focused more intently on academics, earning higher marks than in high school. However, Alfred's interests remained varied, and he served on the student government and was involved in numerous clubs and community activities. Moreover, he was a member of the Reserve Officer Training Corps during his second and third years of school, a commit he transferred to the Army Reserves following his graduation in 1955, after only three years.

B) Professional Beginnings

The next year, Alfred matriculated to Rutgers Law School on the advice of a professor, who had sensed his commitment to community service and leadership abilities. He earned his Juris Doctorate in 1958 and, after passing the bar that fall, entered active duty with the U.S. at Fort Dix, New Jersey. After completing training, he was kept on as an instructor of law and government courses and, not surprisingly, was also

assigned to the Army band. Alfred remained on active duty for four years and was honorably discharged in November 1962, having earned the rank of Second Lieutenant.

In a letter to the Court in support of Mr. Porro, Thomas R. Davis, a longtime friend and Councilman for Carlstadt since 1994, commented on Alfred's commitment to his fellow servicemen:

> I have known Al Porro since my return from overseas in 1957. Al, along with many of us who served in the military in the 1950's made a ritual of getting together every Saturday morning at a local barbershop to socialize. We all developed a strong sense of camaraderie as we pursued our individual careers and raised our families.[1]

When he left active military service, Alfred had a clear direction for the future. He hoped to eventually start a law practice that would allow him an interdisciplinary mix, including environmental, local government, and real estate practice. However, believing that additional experience was necessary, he began working for the Newark firm of Smith, Shingerland, Trauth, & Holtz, for which he had previously clerked. The firm emphasized real estate law for the most part, primarily title searches and closings.

In 1962, Alfred also started a family when he wed the former Joan Maida. Their first child, Janet, was born shortly thereafter. Children played a central role in the couple's relationship, as five more in the next ten years. According to Janet, her father was/is steadfastly devoted to she and her siblings, as well his grandchildren:

> My dad and Joan have instilled their values in the seven children as well as in their grandchildren who adore

---

[1] Unless otherwise noted, the many letters of support cited herein were submitted to the Court on August 2, 1999.

them immensely. . . . [A]ll eleven grandchildren have a deep love and admiration for my dad and Joan. . . . The grandchildren, ranging in ages from 2 to 13, would greatly miss their grandparents who have for years been an integral part of their lives. As for my two girls, given the fact that their father has no contact with them, my dad is the only male role model which they have, and I am proud that he is such to my children.

C) Establishing a Practice and Reputation

In 1965, Mr. Porro finally opened a private practice in Lyndhurst that he remembers as a "dream come true," which allowed him to pursue his enduring legal interests, including coastal zone, tidelands, and wetlands management. He became a consultant to the United States Commission on Marine Science and Engineering, a body that ultimately recommended enactment of the U.S. Coastal Zone Act. Mr. Porro's interests soon became a specialty, and over time, his practice became an advocacy firm suing the state and federal government over, among other things, riparian rights.

Relying on an old English law designed to keep rivers open to the public for free navigation and fishing, the State of New Jersey contented that it could claim any lands on which waters once crossed land at medium or high tide. At the same time, the federal government claimed the right to protect use of these lands as federal "wetlands." Unwilling to fix a specific time limit, the state and federal governments argued that they could claim lands where there had once been a stream. These attempts to press claims to the Meadowlands resulted in an uproar throughout Northern Jersey.

Given Alfred's unique skills, he was called in to assist both private clients and municipal governments. He threw himself into the work using a mix of the rare specialty he possessed, a natural aptitude for the law, and a dogged, if somewhat

pathological, work ethic. Mr. Porro's efforts proved successful, and he was catapulted to national attention, being labeled the "the marsh lawyer" by *National Geographic Magazine*. With the recognition came lecturing and speaking offering as well as the opportunity to teach.

In 1969, he taught at the University of Rhode Island's Law of the Sea Institute, the first of many teaching positions he has held.[2] Mr. Porro also began writing, and over the years he has been published on over 50 occasions in law journals and other law-related publications, such as the *Maryland Bar Journal, University of Baltimore Law Forum*, New Jersey *Law Journal, Trial Diplomacy Journal, and the American Journal of Trial Advocacy*. He has also written or contributed to various books, articles and treatises.

Although Mr. Porro greatly appreciated the many accolades and opportunities, his greatest satisfaction came from the work itself. In addition to his love for the law, he was able to work with countless scientists, engineers, and academics, satiating a childhood interest in ecology and biology, plants and pollywogs. He told NCIA:

> Pursuing tidelands and wetlands suits was a blessing. I loved the nature of the marsh and spent a lot of time, though not enough, outdoors as part of the job.

---

[2] Throughout the 1970's and 1980's, Alfred Porro taught at seventeen academic institutions as either a lecturer, or as visiting or adjunct faculty. These include, but are not limited to Florida Institute of Technology in 1970; Rutgers University Law School between 1970 and 1973; Princeton University in 1971; University of Brisbane in Australia in 1973; University of Georgia in 1977; North Carolina State University in 1978; University of Delaware from 1978 to 1984; Columbia University from 1978 to 1998; Temple University School of Law from 1979 to 1981 ; and the University of Baltimore School of Law from 1981 to 1987. Mr. Porro's course offerings were numerous: Coastal Zone Law, Trial Advocacy, State and Local Government, Evidence, Jurisprudence and the Law of the Sea, Real Estate Transactions, and Technology and the Law.

Edward Buzak, a member of the New Jersey Bar since 1973 and a friend of Mr. Porro's for as long, works in the area of public sector law. He writes of the Defendant's commitment to public welfare through sound, collaborative environmental policies:

> Al was instrumental in forming the AANJ (Authorities Association of New Jersey) in the 1970's in an attempt to bring sewer and water authorities of this state together to address common problems. During those formative years, Al effectively was the association and although, as all associations, it started off with a few members, it now represents over 120 municipalities and county water, sewer, solid waste and improvement authorities in the State and is the preeminent environmental public sector organization in the State.
>
> . . . *He was the mainstay of the AANJ and helped propel it into the strong organization that it is today* (Emphasis added).

In 1960, Mr. Porro was appointed Board of Health Attorney of East Rutherford, a position he held for almost 40 years. Alfred brought his experience as the "marsh lawyer" to the job. Many, often acrimonious, battles with the state ensued over public trust doctrine and the borough's many acres of marshland. As noted in the enclosed article, Alfred's many strengths, including his knowledge of riparian rights, enabled him to successfully defend his clients' rights. He did not work alone, of course, and at least two former allies have taken the time to write on his behalf. One is Dr. Joseph Matriss, DDS:

> With the election of a new Mayor, Henry Helstoski, I was appointed the Sanitarian First Class for the Board of Health and at the same time Alfred Porro was appointed as the attorney to the Board of Health. Later I was

appointed Sanitarian First Class in two other adjacent communities.

Our work began, a Herculean effort not only to rid the community of open dumping, but also rooting out corruption on the Board of Health.

. . . Mr. Porro and I worked closely together in a joint cooperative effort which was part of the overall policy to raise the standards and improve the community. We helped rid the community of open dumping and the corruption. He was always dependable and forthright, never with time limiting his efforts. Much was accomplished with Al Porro on community projects; the Mayor's scholarship Ball, on charitable drives, on a community fundraising drive for one of East Rutherford's football players who couldn't walk because he sustained a spinal injury, and many other matters which would improve the town. One could always count on Al Porro to aid in an effort.

Les Plosia, a journalist, independent councilman and, after 26 years, retired Chief Tax Assessor of East Rutherford[3], has submitted an entertaining and insightful letter that perhaps illustrates best the enormous magnitude of Mr. Porro's more than two decades of service to East Rutherford:

His municipal work was exemplary, thorough and courageous; his work vis a via the NJSEA was superb . . . . Repetitive sovereignty and court classes stemming from the special NJSEA Act enacted in 1971, with its end run around the 1947 N.J. Constitution's gambling prohibition, had sparked litigation shouldered by Mr. Porro . . .The Borough was compelled and duty-bound to enforce its legislated entitlement to fair and just

[3] Mr. Plosia is also the younger brother of the Honorable James L. Plosia, former mayor of East Rutherford for a quarter century

compensation for lost ratables and revenue holes punched by condemnations in its tax base.

. . . The State Bulldozer merely rammed ahead, taking no prisoners, its soldiers smug in the knowledge that the attorney general ex officio sat as a member of the NJSEA ruling clique.

Standing in the way was Mr. Porro, legal arm of the Borough, directed by the Mayor and Council. He sued in Superior Court, where the Act was upheld by Judge Morris Pashman, affirmed by higher state courts.

. . . [T]he town was forced to cope with ratable tax holes, ruinous to budget-making, from a bewildering maelstrom of takings not only by NJSEA [New Jersey Sports and Exhibition Authority] but also by highway builders falling all over themselves to accommodate the budding complex. . . *The State's reaction to its own internal confusion was to scapegoat Mr. Porro by having the Bergen County prosecutor indict him when the Sewerage Authority was being formed, a charge eventually thrown out for prosecutorial misconduct.*

. . . When Mayor Plosia had taken office Jan. 1, 1970, every property in East Rutherford's meadowlands was under appeal before the State Division of Tax Appeals. By 1977-1978, we had forged an interim 5-year in-lieu agreement with the Sports Authority, undertaken to stabilize municipal cash flow. Still unresolved and in court flow were massive D.O.T. takings, including some 178 Borough-owned acres part of which was in title dispute.

. . . [T]he East Rutherford mayor, Mr. Porro and I for the first time in ten years succeeded in meeting personally with the Authority Chairman, leading to a swift and

amicable resolution of pending appeals of the condemnation awards and, sequentially, final settlement of the protracted in-lieu dispute to a point that today yields the Borough an annual yield equal to 20% of the tax levy.

. . . *Due to these difficult and strenuous undertakings over a SPAN OF NEARLY TWENTY YEARS guided by Mayor Plosia and spearheaded by Mr. Porro and I, the Borough to this point in time has realized a cumulative gain of some $25,000,000 dollars over and above the offering numbers, money which has paid higher salaries to East Rutherford teachers, policemen and public works employees while enabling the Plosia Administration to afford taxpayers the lowest effective taxes in northern New Jersey* (Emphasis added.)

D) Marital Separation

Though his career continued on its stellar trajectory, the long hours spent at work and his unyielding devotion to the law, ultimately led to marital problems. It was not uncommon for him to remain at his office until 2 A.M., working on ongoing litigation, preparing lectures, or writing, after having attended to a full day's worth of professional or social demands. In retrospect, Alfred acknowledges that his schedule did not allow him to devote time to his wife. Yet, it was more than this that caused the Porros to grow apart. By 1973, they no longer spoke unless necessary and slept in separate rooms. The sole reason they remained together was "for the sake of the children."

In 1974, Alfred moved out and took an apartment. During this period, he began seeing Joan Atkins. Shortly after he and his wife formally separated in 1976, he and Joan moved in together and soon discovered that Joan was pregnant. Though

unplanned, Joan was happy to have the child, Amanda, who was born in 1978. Alfred's divorce was finally completed in 1983, and, the next year, he and Joan wed and purchased a house in Hasbrouck Heights.

E) Life Continues

Throughout these many years of personal turmoil, Mr. Porro's professional life boomed. In addition to taking several civil rights cases, many on a *pro bono* basis, he concentrated heavily on work in the East Rutherford Meadowlands Area and Atlantic City. Over time, he brought numerous attorneys into the firm, at one point totaling 12. The firm represented scores of prominent local, national, and international clients: Hackensack Meadowlands Municipal Mayors Committee, Authorities Association of New Jersey, Borough of East Rutherford and Carlstadt, B.P. Oil, Dunkin Donuts, Inc., and the United States Commission on Marine Science, Engineering and Resources.

In addition to his practice and teaching responsibilities, Alfred also acted in a variety of capacities for Congressman Henry Helstoski, the former mayor of East Rutherford. He served as Congressman Helstoski's campaign manager, manager of district affairs, and general counsel. In 1975, Mr. Porro was named in an Indictment charging Helstoski in an immigration-related matter. Years later, a New Jersey commission established to examine the impact of organized crime in New Jersey, specifically the Genovese crime family, also investigated him. Apparently, Alfred had unwittingly represented, and assisted in the representation of, several purported Genovese associates in cases involving coastal land ownership that were brought against the state.[4]

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[4] The same phenomenon that had struck the Meadowlands also afflicted Atlantic City and other parts of New Jersey's southeastern coastline as the state moved to stake claim to lands on which valuable

Although Mr. Porro was ultimately cleared in both of these matters, he has always viewed the stigma of Indictment and the stain of investigation as permanent smears to his reputation. The allegations, and the accompanying public attention they received, were even more upsetting given Mr. Porro's stature as a respected attorney, noted academic and dedicated community member. Still, those closest to Alfred Porro, like John P. Palmisano, who has known the Defendant since their first year in law, understood his true character:

> From my viewpoint and those of others who dealt with Al, during our school years and subsequent professional careers it was so common as to be taken for granted that if you asked anything of Al, you would receive it and if he gave you his word you could count on it.
>
> . . . Al's community contributions in the last three decades in the development of the legal principles now associated with the present law of Tidelands not only paved the way for the development of the Meadowlands, but made him one of the foremost legal experts in that field; giving his time willingly and most often gratuitously in tutorial lecture circuits.

Sylvia Blumenthal, age 68, was employed as the Defendant's firm from May 1978 to September 1998 and witnessed firsthand his (and his wife's) upstanding nature:

> During these 20 years I had the opportunity to observe the character of Joan and Al Porro. They have always been very hard working, coming in early in the morning and still in the office when I would leave. Many times I

---

buildings were built. Once again, Alfred was actively involved in stymieing state efforts to claim land that was crossed by tidal waters. Considered perhaps the state's leading expert on riparian rights, Alfred was also called upon to consult with attorneys on many cases of the vast swell of litigation that resulted from the state pressing its claims along the New Jersey seaboard.

> have seen them give advice and help people and not ask anything in return. Many times clients were unable to pay their bills but this did not stop Al and Joan from handling their case to the end and also being treated with respect. They did not know how to say NO to anyone who needed help.
>
> . . . Through the years I have been aware of many charitable causes that Joan and Al were very involved with. They ran functions and raised money for Fair Housing, Unwed mothers and underprivileged people. They put much time and effort to these and other causes. Also donations were constantly being made to a great many good and needy causes.

Lastly Thomas Davis, the Councilman for Carlstadt, who also had a career as a police officer and private investigator, noted with particularity the Porros' efforts in more recent years to protect Carlstadt from developers who planned to build a shopping center and 5,800 homes on a 600-acre tract of land which would have tripled the town's population and placed burden on municipal services and tax payers. Mr. Davis explains that the Defendants' actions on behalf of the Borough demonstrate their professionalism and duty-bound nature, as their obtaining a decision favorable to the Borough was at considerable personal financial loss:

> . . . [O]ur municipality was confronted by certain political forces intended to literally destroy our community through an overly ambitious development plan. *Al and Joan Porro* saved our small community and regardless of every politician jumping on the bandwagon to take the credit, they along fought, lawyered, and won a battle that everyone said could not be won.
>
> After successfully winning this fight, we were again faced with an attempt by developers to promote private

> development on State owned property which would have had serious negative economic and environmental impact to our entire region. Again, Al and Joan went to work and beat the odds by having this plan scrapped. *The record is clear that the Porro's would have personally benefited financially if they were not successful in either or both of these efforts because of their private ownership of properties within the areas proposed for development. Their successful litigation of these issues was not only characteristic of their competent legal representation, but more importantly is typical of their sincere personal concern for our community and neighboring communities* (Emphasis added).

Alfred Porro's tremendous work ethic and commitment to his profession and clients have earned him tremendous accolades and, in the process, made him reasonably wealthy. These victories, however, came at a price. By 1989, Alfred's children, now grown and expecting children of their own, demanded that he return home, slow down, and dedicate more time to his family. He was a willing listener. Already well known in his field, Alfred felt very acutely that much of his life remained underdeveloped.

He left a teaching position at the University of Baltimore School of Law and returned to practice, making certain that he spent as much time as possible with his wife, children, and grandchildren. Moreover, his ex-wife was sick with cancer at that time, and he felt it would be appropriate to provide additional support to their children during this trying period. According to Thomas Davis:

> Few people know that Al Porro routinely rises early on weekend mornings to visit his children and grandchildren with gifts of sweet rolls from the local bakery before he goes to his office or attends religious services. Al never mentions these things. I was told

about this confidentially by one of his children several years ago.

Courtney Bayer, a long-time friend, noted Alfred's spirituality and love of family and friends:

> Without fanfare and bravado, he has given his friends and family ALL that is in him. By this I do not mean just material things, but love, kindness, fatherhood, brotherhood; he has given us a sense of devotion to our family community and insists—even now—that God's will must truly be our own.

III. PERSONAL BACKGROUND OF JOAN ATKINS PORRO

Joan Atkins was born on July 2, 1947 in Passaic, New Jersey, the third of four children from the union of John Atkins and the former Theresa Dellinda. Mr. Atkins, age 78, was raised in a Christian orphanage in Wayne, New Jersey, where he and his six siblings were sent after their father's untimely death and mother's resultant, debilitating nervous breakdown. A retired carpenter and foreman, Mr. Atkins was an active union member who worked building sewage treatment plants around North Jersey. Mrs. Atkins, age 76, was born and raised in Passaic. She worked intermittently in local factories and retail outlets, but devoted much of her life to raising her four daughters. She is currently very ill with Alzheimer's Disease.

Joan's oldest sister, Lorraine Molinaro, age 56, is a homemaker who lives with her husband and three adult children in Deering, New Hampshire. Theresa Sproviero, age 54, is the divorced mother of two adult children. She worked at the Porros' firm for 23 years and now lives with Joan and Alfred. Lastly, Barbara Atkins, age 48, is a divorced mother of two adult children living in Lodi, New Jersey.

A) Life in Lodi

Joan's young life in the middle class neighborhood of Lodi was a quiet one. She was an above average student and was active in school clubs and social meetings. Beginning in her junior year, she worked as a clerk in a local retail shop and additionally spent a great deal of time looking after Lorraine's infant daughter. Joan's sister had married young and fell seriously ill in childbirth, forcing her to be hospitalized for some time. Joan provided whatever assistance was needed in caring for her infant niece well after Lorraine returned home.

After graduating from Lodi High School in 1965, Joan briefly attended Montclair State Teacher's College. She was unhappy there, however, and aspired to attend Douglas University in New Brunswick. Unfortunately, her family was unable to afford the tuition at Douglas. Rather than completing her degree at Montclair State, she withdrew after one semester and worked a variety of jobs (retail, bank, data processor, clerical assistant).

B) A New Career

In 1973, Joan returned to school in hopes of earning a degree in French and one-day teaching or working as an interpreter for the United Nations. She enrolled at Farleigh Dickinson University and went back to live with her parents to better afford school. The experience proved to be a grueling, though rewarding, one. She was working at Alfred's law firm as clerk/receptionist and maintaining a rigorous course schedule. Because the firm's offices were only one mile from campus, Joan commuted back and forth, successfully fulfilling all of her responsibilities.

Her diligence paid off, and like Alfred, she graduated in three years. While Joan considered pursuing a graduate degree in French, both Alfred, whom she was then dating, and her father convinced her to pursue a law degree. She

recalls that her father thought "it would be wonderful to have a professional in the family. As for Al, he's just in love with the law." Similar to her collegiate schedule, Joan attended Seton Hall Law Center full-time during the days and researched case law and drafted pleadings in the afternoon and evenings.

The period was particularly busy for the firm because Alfred had retained a number of attorneys who were consumed with litigating for private clients whose land in the Meadowlands had been claimed by the state. Joan's most distinct memory of that time is "persistent fatigue." In addition to school and work, she was also a devoted mother to her infant daughter, who was born midway through law school. Joan's first exposure to the criminal justice system came when Alfred was named in the Helstoski Indictment. Believing that part of the reason Alfred was named in the Indictment was the constant irritation his successful activism was to the State, Joan went to work researching applicable case law.

Joan graduated from Seton Hall in 1979 and passed the bar in June 1980. She continued working with Alfred's firm and was involved with a major case on sewerage authority law. That case sparked an interest, and Joan opened her own practice specializing in sewerage authority and utility law. Simultaneously, Alfred took a teaching position with Temple University while pursuing a L.L.M.

Though Joan's career has not been as long or as varied as her husband's, she has shown a similar unwavering dedication to the law, her community, and the disadvantaged. Among her many achievements and accomplishments are being twice published by the *New Jersey Lawyer* for articles on sewerage authority law and zoning and municipal government. Joan also acted as Assistant Municipal Attorney in addition to handling civil service and Police Benevolent Association matters. Among other things, in 1988 when New

Jersey began building Route 208 and Interstate 287, she sat as a commissioner who assisted in determining fair compensation for homes and land taken by the state to make way for the project.

Joan has also given a great deal of time to being a mother, stepmother, and step-grandmother over the past two decades, more so since the death of Alfred's first wife in 1992. Over the years, several of Alfred's children have come to live at the family home in Hasbrouck Heights, and Joan has become increasingly close with all of them. Moreover, as discussed in greater detail below, she has spent significant time helping care for her ailing mother in recent years.

IV. ANALYSIS OF THE OFFENSE BEHAVIOR

A careful review of the instant case reveals that in spite of their convictions, which are currently under appeal, Alfred and Joan Porro had no intent to harm the Galofaros or other individuals alleged as victims by the government and Probation Office. Rather, it would seem that a severe financial crisis compromised their good judgment causing them to misapply funds. Misstatements on loan applications, "puffed" financial statements, and the like, are reminiscent of the "go-go" 1980's, when many investors, particularly those involved in land transactions, found themselves without a safety net when the economy soured, land values plummeted, and growth became stagnant. Though not excusing the Porros' behavior, it seems as if their misstatements and misappropriations do not appear properly characterized as an overt attempt to cause loss.

Based on more than 20 years of experience, the typical misappropriation of funds case involves a taking without the client's knowledge. In this instance, the Galofaros' mother and accountant were made aware of at least the first removal of funds and, in the end, *all moneys taken were repaid in full, with interest.* It seems undeniable that, inappropriate as

it may have been, the Porros' intent was to "borrow" not to steal. As discussed in the following section, these facts distinguish their offense behavior from the heartland of money laundering cases, thereby providing an appropriate basis for downward departure.

Lastly, NCIA has reviewed the Presentence Reports, the Defendants' respective responses, and the government's motion for upward departure. Thus, we are aware of the many factual and legal matters presently in dispute. Believing that the Court is clearly in the best position to evaluate and resolve these differences, we would simply highlight that *the Probation Office's account of the Porros' offense conduct, appears to be a verbatim recitation of the factual allegations in the government's submission. This would suggest that rather than conduct a thorough and impartial investigation into the instant matter, the Probation Office simply copied the government's motion, including allegations that neither formed the basis of the Indictment against the Porros nor which were proven at trial. Such a practice is not only counter, but also repugnant, to the fair administration of justice.*

V. ANALYSIS OF THE FEDERAL SENTENCING GUIDELINES

According to the Probation Office's calculations of the Federal Sentencing Guidelines, both Defendants' total adjusted offense levels are 29. With a Criminal History of I, their recommended guideline ranges are 87 to 108 months. *The Defendant's guideline calculations noted in their responses to the PSR on July 26, 1999, yield a sentence range of 30 to 37 months.* As noted above, NCIA is also aware of the Porros' many objections to their respective Presentence Reports and the guideline interpretations therein. While taking no opinion as to what the final total adjusted offense levels should be, we do believe that Probation

Office's calculations require careful scrutiny. Specifically, we support that Porros' position that application of the 1999 edition of the Guidelines gives rises to *ex post facto* concerns and that the Galofaros should not be held "vulnerable victims" as the Defendants did not target them. *Moreover, there are significant issues remaining that must be resolved. Namely, whether the obstruction of justice enhancement can be properly applied in multiple groupings, we don't believe it can be; what is the valuation of the bank's actual loss as opposed to its potential loss, if any; and whether the Porro's guidelines were improperly enhanced by the Probation Office for "role" when no other participants appear to have been managed or supervised by them?*

Recognizing that the Porros intend to fully address the Guidelines calculations during their allocution on August 13, NCIA respectfully leaves those matters to the Court and turns instead to factors we believe substantiate downward departures, regardless of the Defendants' ultimate adjusted guideline range. The framework governing the appropriateness of a downward departure in a given case post-*Koon* is well established in the Third Circuit. *United States v. McBroorn*, 124 F.3d 533, 537-38 (3rd Cir. 1997). However, NCIA would also ask the Court, when determining whether and to what extent to depart, to consider Justice Kennedy's articulation of the principles and objectives underlying the Federal Sentencing Guidelines:

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. *This too must be remembered, however. It has been uniform and constant in the federal judicial tradition for the*

> *sentencing judge to consider every convicted person as an individual and every case as a unique case study in human failings that sometimes mitigate, sometimes magnify, the crime and punishment to ensue.* We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States District Judge.

Koon v. United States, 116 S. Ct. 2035, 2053 (1996) (Emphasis added).[5]

In this case, NCIA offers that with respect to Alfred and Joan Porro, at least four separate grounds exist for downward departure: (1) the case is outside the 'heartland' of money laundering cases; (2) loss overstates the seriousness of the offense behavior; (3) exceptional community service and civic activity; and, (4) family responsibilities and circumstances.

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[5] Richard P. Conaboy, former Chairman of the United States Sentencing Commission, has echoed the majority's sentiment:

> A departure sentence is still a guideline sentence, not an end-around the system. A sentence must not only fit the crime but also the individual who committed it.

Address to the Federal Sentencing Guidelines Seminar (Clearwater Beach, Florida May 14, 1998)(Emphasis added). As Your Honor is no doubt aware, Judge Conaboy serves as U.S. District Judge for the Middle District of Pennsylvania and chaired the Pennsylvania Commission on Sentencing from 1977 to 1980. *See also United States v. Gaskill*, 991 F.2d 82, 86 (3rd Cir 1993)("It is important, too, to realize that departures are an important part of the sentencing process because they offer the opportunity to ameliorate, at least in some aspects, the rigidity of the Guidelines themselves. District judges, therefore, need not shrink from utilizing departures when the opportunity presents itself and when circumstances require such action to bring about a fair and reasonable sentence.")

A) Outside the § 2S1.2 Heartland

> The Commission intends the sentencing court to treat each guideline as carving out a 'heartland', a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

Introductory Commentary, 4(b), Ch. 1, Pt. A, USSG (1995). Here, we find two defendants convicted under 18 USC § 1957(a), which, according to Appendix A of the Guidelines, mandates application of § 2S1.2, a byproduct of the Anti-Drug Abuse Act of 1986. Having reviewed the voluminous amount of legislative and judicial attention given to application of the money laundering guidelines since their enactment in 1987, NCIA respectfully argues that the Porros' conduct with respect to Count Four of the Superseding Indictment falls far outside of the heartland of cases to which the Commission intended § 2S1.2 to apply. *Koon*, 116 S. Ct. at 2044; *see* USSG § 5K2.0.

1. Legislative History

The threshold question in determining whether a § 5K2.0 departure is warranted is "What constitutes the heartland of a § 2S1.2 offense?" As recognized by numerous commentators and several courts across the country, the legislative history underlying passage of the Anti-Drug Abuse Act of 1986, as well as internal Department of Justice policies, indicates that the statutory provisions which gave rise to the money laundering guidelines, 18 USC §§ 1956 and 1957, were enacted to combat the activities of those individuals involved in large scale drug distribution and those engaged in organized crime, who traditionally sought to legitimize vast sums of money derived from ongoing criminal enterprises. *See United States v. Ferrouillet*, No. CRIM.A. 96-198, 1997

WL 266627 (E.D. La. May 20, 1997), *aff'd United States v. Hemingston*, 157 F.3d 347 (5th Cir. 1998); *United States v. Bart*, 973 F. Supp. 691 (W.D. Tex. 1997); *United States v. Caba*, 911 F. Supp. 630 (E.D.N.Y.), *aff'd* 104 F.3d 354 (2d Cir. 1996).

In support of the initial legislation, Senator Alfonse D'Amato (R-NY), a chief sponsor, explained the need for the money laundering statutes:

> Money laundering permits the drug traffickers to evade taxes and to finance their drug networks behind a veil of secrecy. It allows them to buy more drugs for resale, and to acquire the planes, boats, and front corporation they use to smuggle into the United States.

Likewise, Senator Joseph Biden (D-DE) observed:

> Money laundering is a crucial financial underpinning of organized crime and narcotics trafficking. Without [it], drug traffickers would literally drown in cash. . . [They] need money laundering to conceal the billions of dollars in cash generated annually in drug sales and to convert [their] cash into manageable form.

Ferrouillet, 1997 WL 266627 at 5 (citations omitted). The Tenth Circuit, which had occasion to survey reports pertaining to the Anti-Drug Abuse Act, concluded that 18 USC § 1957 was intended to criminalize classic money laundering, "where a drug trafficker collects large amounts of cash from drug sales. . . ." *United States v. Johnson*, 971 F.2d 562, 568 (10th Cir. 1992).

2. The Commission's Position

The money laundering statutes had been in effect for less than six months when the Sentencing Commission created the money laundering guidelines. Consequently, unlike nearly ever-other initial set of guidelines, the framers lacked both

data on pre-Sentencing Reform Act sentencing and time served trends and established jurisprudence interpreting the statutes to inform their formulations with respect to § 2S1.1, et. al. USSC, *Report to Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report*, p. 3 (Sept. 18, 1997). Without this guidance:

> . . . the Commission necessarily based the guideline penalties for money laundering offenses upon its own understanding of the types of conduct about which Congress was most concerned, and on information from DOJ about how it expected to employ the new laws. *The relatively high base offense levels for money laundering were premised on the Commission's anticipation that prosecutions would address 'money laundering activities [which] are essential to the operation of organized crime,'*[6] and would apply the money laundering sentencing guidelines to those offenses where the financial transactions 'encouraged or facilitated the commission of further crimes' or were 'intended to . . . conceal the nature of the proceeds to avoid a transaction reporting requirements.'

Id. at 3-4 (Emphasis added).

In May 1995 the Sentencing Commission unanimously approved (with one abstention) an overhaul to the money laundering guidelines due to what it perceived their arbitrary

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[6] In a footnote, the Commission highlights the stark contrast between the base offense levels for money laundering offenses (17 to 23), which it lists as analogous to "violent and national security offenses" (forcible extortion, arson, espionage, serious drug offenses), to those for "other non-violent, non-drug offenses" (theft, fraud, insider trading, obstruction of justice). *See* USSC, *Money Laundering Working Group Report*, (October 14, 1992)(higher base offense levels based on conclusion that the statutes "would generally be applied primarily to 'traditional,' and perhaps *large-scale, professional money launders*")(emphasis added).

application and resultant disproportionate impact.[7] As the Court is likely familiar, Congress summarily rejected the Commission's proposal, which was submitted with changes to eliminate the roundly criticized crack-cocaine guideline disparity, though both the Commission and the Department of Justice (DOJ) were instructed to investigate the perceived problems further. The DOJ report, issued in June 1996, looked at the history of money laundering conduct, its criminalization, and prosecutions under §§ 1956 and 1957, namely law enforcement objectives and the effect of the Guidelines. *Id.* at 12. In an effort to increase uniformity, the DOJ also prescribed certain, elective policies and guidelines to help govern the 94 United States Attorneys' offices use of the money laundering statutes.

In its 1997 Report to Congress, the Commission is quick to point out that well over half of the U.S. Attorneys' offices had not instituted the recommended guidelines, and those that did implement some measures were far from uniform. *Id.* at 14. According to the Commission, the DOJ's failure to take stronger action is quite troubling:

> Moreover, the DOJ policies do not appear to address concerns repeatedly expressed to the Commission about the inappropriate use of threatened money laundering charges to obtain pleas to other statutory offenses, *concerns that are exacerbated by a guideline structure that does not properly coordinate penalties with the seriousness of the underlying conduct.*

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[7] The 1992 Money Laundering Working Group found that:

> Over the years the relevant statutes have been applied to a broader range of conduct that the commission expected. For example, the statutory phrase 'to promote the carrying on of specified unlawful activity' has not been limited to offenses in which the defendant 'encouraged' or 'facilitated' the commission of further crimes.

"Summary of Findings," p.1.

Id. at 14 (Emphasis added).[8]

Findings from the Commission's own research are even more disturbing:

> *The Commission's long term analysis of money laundering cases also demonstrated that the intended relationship between the harm caused and the measurement of the offense seriousness under the money laundering sentencing guidelines has become distorted. Individuals who engaged in essentially the same offense conduct received substantially higher or lower sentences, depending on whether they were charged, convicted, and sentenced under the underlying offense-related statute, or the money laundering statute, or both.*
>
> * * * *
>
> In fact, the Commission's analysis of money laundering sentences reflects that disparate sentencing persists as a result of the structure of the current money laundering guidelines. For example, from 1992 through 1996, the election to pursue a money laundering charge in addition to an underlying fraud-related offense would raise the guideline penalty in 85 to 95 percent of the cases.
>
> * * * *
>
> *Judicial dissatisfaction with the broad reach of the money laundering guidelines has often resulted in a determination that the actual conduct for which the defendant was convicted was outside the 'heartland' of the money laundering guidelines as drafted by the*

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[8] The Commission also cites the DOJ's failure to "discuss policies which inform the government's decision of not bringing money laundering charges when the underlying conduct would appear to sustain such convictions." *Id.* at 15.

> *Commission, thereby justifying a substantial downward departure.* . . . Excluding departures attributable to substantial assistance motions under USSG § 5K1.1, which are initiated by the prosecutor, *the average downward departure rate for non-drug money laundering convictions for the past five years is 32 percent higher than the overall departure rate*[9] . . . (This) suggests that judicial dissatisfaction with the money laundering guideline structure, at least as it relates to laundering of funds from non-drug-related offenses, is far more commonplace than the reported decisions alone suggest.

Id. at 7-9 (Emphasis added).

3. Analysis

Guideline Section 2S1.2 was promulgated to correspond with 18 USC § 1957 violations-Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity. The Commission provided for a base offense level of 17, noting:

> In keeping with the clear intent of the legislation, this guideline provides for substantial punishment. The offense levels are higher than in § 2S1.3 [Structured Transactions] because of the higher statutory maximum, and the added element of knowing that the source of funds were criminally derived property.

"Background Commentary." As the Commission understood it, the money laundering guidelines were to encompass a narrow heartland, a position shared by the Department of

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[9] According to the *1997 Sourcebook of Federal Sentencing Statistics*, absent § 5K1.1 departures, district courts granted downward departures in over 40 percent of §2S1.2 cases.

Justice. "The DOJ United States Attorney's Manual provides the money laundering section of the United States Attorney's Office was created to prosecute . . . only particularly sensitive cases [for money laundering]." *Bart*, 973 F. Supp. at 697.

Although the Guidelines do not take the government's charging decisions into account, sentencing the Porros under the money laundering guidelines for what is, at essence, a misappropriation or theft case would result in their receiving a much harsher penalty than other, like defendants sentenced under a more commensurate guideline, such as § 2F1.1. *Id.* at 698 (citing *Koon*, 116 S. Ct. at 2044). The evidence brought out at trial reflects that while the Porros diverted funds from the Galofaro account, those moneys were wholly legitimate, as they were proceeds of an inheritance. Moreover, it appears from the record that investing the funds was not an attempt to "clean" the money, but rather an attempt to bolster a faltering project with which Alfred Porro was involved. Thus, applying § 2S1.2 to the case at bar results in irrationality—"the case is outside the normative heartland and a departure is warranted." *Id.; see Caba*, 911 F. Supp. at 635 ("[t]here is no indication that Congress intended to equate [minor] fraud with drug trafficking or to escalate it to a crime whose sentencing exposure would be multiple of what [the underlying offense] had been").

B) Loss Overstates the Seriousness of the Offense Behavior

The definition of "loss" generally encompasses the greater of the actual loss or intended loss. *See United States v. Kopp*, 951 F.2d 521, 531 (3rd Cir. 1991) (loss defined as the greater of the amount the victim lost in fact and the estimated amount of the intended or probable loss). There is little argument that Defendants' actions were improper, but what is equally clear is that this case is an atypical money laundering case. What we believe to be highly relevant to the Court's deliberations is

the issue of intent, or, more specifically, the lack thereof. As evidenced by the record, Alfred and Joan Porro repaid the Galofaros in full, with interest, and satisfied their outstanding 1989 tax liability before Indictment, corrective measures which suggest a lack of desire to cause financial harm. As such, the "loss" for sentencing purposes seems to overstate the seriousness of the offense behavior.

> In a few instances, the loss determined under subsection (b)(l) may overstate the seriousness of the offense. . . . In such cases, a downward departure, may be warranted.

U.S.S.G. § 2F1.l, App. Note. 10. *See United States v. Walters*, 87 F.3d 663 (5th Cir.), *cert. denied* 117 S. Ct. 498 (1996) (affirming a downward departure in a money laundering case and allowing the district court's reliance the reference to the preceding Application Note as the legal basis for departure).

C) Exceptional Community Service

By all accounts, the Porros have an exceptional record of both public and private good works. As Alfred is 12 years older than his wife and practicing law for 20 years longer than she, he has understandably had greater opportunity to work for and with others. Nevertheless, their record of charity and benevolence, both separate and joint, is commendable and deserving of the Court's consideration. The Honorable Henry Heistoski noted in his letter to the Court dated July 15, 1999:

> More important than what I can offer is Al Porro's community and region wide reputation for honesty and truthfulness and his compassion which has made him recognized as a champion for the underprivileged through numerous pro-bono representations. Al Porro has served as the Borough Attorney for East Rutherford for 40 years under various administrations while his wife

Joan Atkins Porro has devoted much of her time to the Fair Housing Authority of Bergen County and other causes fighting discrimination.

Alfred Porro has been consistently active with the local and state Bars since earning his law degree in 1958. One of his most memorable endeavors was his involvement with the State Bar's Emergency Professional Assistance Committee, whose purpose is to provide emergency assistance and coverage to attorneys suffering from alcohol and drug dependence issues. Through this program, bar members, especially solo practitioners, are able to attend substance abuse counseling and leave their practice under supervision of seasoned attorneys, such as Mr. Porro.

Alfred's philanthropic efforts also include social and civic activities, ranging from church to the Elks Club. True to his devotion to the law, many of these activities are related, if only peripherally, to the law. These include the Health and Welfare Council of Bergen County, the Bergen County Community Action program, the Urban League for Bergen County, and the Boy Scouts Legal Post 357. With respect to the latter, Mr. Porro founded the Legal Explorers Program, for which he received the Boy Scouts' William H. Spurgeon III Award, a national commendation recognizing those who foster Exploring's ideas, aims, and purposes.

Like her husband, Joan Porro was also an active member of the Bergen County Bar Association. She ran a Law Day essay writing contest open to all area high school; she marked the papers along with the Bar's Executive Director and afterwards gave a speech honoring the award winners. She has worked on the Municipal Law Committee, which acts as a local clearinghouse on case law on relevant legal trends, and the Land Use Law Committee, actively participating in its annual symposium, which is attended by engineers, municipal and zoning board members, councilmen, mayors, city planners, and attorneys. Joan also served as chairperson

of the Pro-Bono Committee, a program initiated by Alfred that manages a referral plan for indigent subscribers.

Mrs. Porro has also been involved with the Board of Directors of the Bergen County Legal Services, which is funded by Federal, State and County grants. And, more notably, she worked for the Fair Housing Council of Northern New Jersey, serving as President from 1986 to 1990. The Council represented those experiencing housing discrimination, mostly minorities and single mothers. The program was unpopular with many, ranging from realtors and landlords to homeowners, all of whom were afraid an influx of these populations would decrease property values. The problem of housing discrimination was widespread in Bergen County at the time, and Joan pressed on, holding fundraisers to finance civil actions. Additionally, she assisted the Health and Welfare Council of Bergen County, a referral service for the indigent with health problems who were having troubles receiving public assistance.

Lee Porter, Executive Director of the Fair Housing Council of Northern New Jersey since 1970, recounts the years of faithful service Joan Porro gave the Council:

> . . . *[I]t was the relentless, unwavering volunteer efforts of Joan Porro which played a major role in keeping the Council financially solvent during a difficult period. We asked for a hand and Joan Porro gave us the entire arm and assistance from members of the family of Joan and Al Porro.* Joan could have been enjoying herself and having fun in other pursuits, but she chose to make it possible for the Fair Housing Council to service the community and help others who couldn't help themselves when confronted with the humiliation of discrimination in housing. By mid '80 our client caseload increased from a few hundred to 4,000. . . In almost twenty years that I have known Mr. and Mrs. Porro I have found them to be persons of integrity,

> honesty, committed to social justice and charitable causes. *All work done on behalf of the Council was strictly volunteer and without compensation* (Emphasis added).

Together, Joan and Alfred were instrumental in initiating a Bar "buddy program," where seasoned attorneys assist and counsel new admittees. The Porros have also hosted the Bergen County Legal Services public service awards since the program's inception in 1985, another initiative Alfred was instrumental in bringing about. Lastly, the Porros have worked in a legal education program with the Boy Scouts, C.C.D. and Bible study at church, and the Several Sources Foundation (SSF). SSF provides unwed mothers with an alternative to abortion, giving them both financial and emotional support. The Porros assisted the program's manager, Kathy DeFiorè, in opening a second group home.

These accounts are but a small fraction of the many activities to which the Porros have availed themselves in hopes of making their community a better place to live. They have not gone unnoticed either. As reflected in many of the letters written in support of the Porros, they each enjoy a reputation for caring, kindness, and generosity, of money and time. William J. Jones has served for eight years as a Councilman in East Rutherford and has known the Defendants his entire life:

> If I were to write 50 pages, I could not cover everything. *. . . The charitable activities in the Porro's lives are numerous. I know firsthand of their work with single mothers and battered women. My respect for them is such that anytime they asked for donations for any cause I gave, and without question.*
>
> *. . . They have both given so much of their professional lives to East Rutherford, not only as attorneys and advisors, but also supporters. I cannot think of an event*

> *they did not sponsor, every yearbook, program, play, dance, fund raiser, raffles, senior citizen picnic, little league, fire department, VFW, Legion and all the various religious groups in town.*
>
> It might seem like par-for-the-course, but we cannot forget every hour they billed the Boro they gave us two free. . . . There were many years they didn't get paid two or three months of fees at the end of the year because the town was out of money. They never resubmitted their bills. *The love they have for East Rutherford was genuine and ran deep. There is nothing you could not ask them for* (Emphasis added).

Stewart V. Veale became acquainted with Alfred through his position as mayor of Ridgefield, New Jersey for the past 22 years:

> Al has been very helpful to me and to my community as both an attorney for the Borough of Ridgefield and as a member of the Hackensack Municipal Mayors Committee as we alternatively work with, or battle against, the HMDC [Hackensack Meadowlands Development Commission] as circumstances dictate. Al has been thoughtful, incisive, and honorable in his dealings with my Borough and the HMDC.
>
> In addition to my knowledge of Al's legal skills, I know first hand of his interest in helping charities. . . . As you weigh what an appropriate sentence might be, I hope you will consider the qualities I have mentioned as well.

Victor M. Gardella, President of Professional Insurance Associates, has known Alfred for 60 years and Joan for 20:

> *I have known them to be thoughtful, generous and civic minded people. I know that they have performed many charitable activities and in my dealings with them on a professional and personal level, I always found them to*

> *be fine human beings, with a great sense of integrity and helpfulness.. . . Joan and Al have contributed greatly to their community.*(Emphasis added).

Mary Lee Palumbo has known Joan Porro since they were in the first grade, and Alfred since the Porros married:

> Because of the Porro's commitment to a variety of community and charitable events, I also found myself involved. *I saw first hand how much they were committed to causes which touched their hearts, i.e., fair housing and the plight of unwed mothers with no place to turn. People are expected to open their hearts and homes to friends and family, and Joan and Al certainly do, but they also do the same for strangers in need* (Emphasis added).

The Porros' helpfulness and good deeds extend beyond the community, directly to less fortunate individuals. Darlene Ross, a financial news editor with Dow Jones, writes:

> Al and Joan hired a young, single mother from our church to work in their office. This generosity allowed the woman to learn skills and improve her existing ones, it also gave her work experience and a sense of self-esteem. . . . They gave this woman a chance without really knowing much about her, but because they knew she needed the work. That's the kind of people I have known them to be.

Christopher Jameson has known the Defendants for only three years, but felt compelled to write a three-page letter attesting their character and integrity:

> Ever aware of the need to use his time judiciously to defend himself, he [Al] generously lent his legal expertise to assist in this worthy endeavor [assisting the Northeast Christian Academy]. This same school was having some financial problems and Joan was able to

make some viable suggestions that helped put the school on the right track.

. . . On many occasions the Porros have offered their home for church events. . . . I sing with Joan in our church choir and Al sends me a weekly prayer communiqué. So there is more to their spiritual life than merely letting their house be used for spiritual occasions.

. . . I have worked with Al and Joan on various charity efforts. . . . Al and I volunteered at an inner city food distribution on one of the hottest Saturdays in Newark last year. We spent the day on a dirt lot handing out food and groceries to some 3,500 needy people.

Reverend John Czubkowski, Pastor of Praise Assembly Church in Garfield, NJ, writes:

Their desire to be helpful and generous is very easily noticed by all who know them. For the last several years they have given of themselves to very good charitable causes. They have given of their time, even when they should have been preparing their defense. You could see them serving food in a food kitchen to the homeless and less fortunate, working for fund-raisers to help children that are terminally ill, give regularly to the church operated food pantry, serve in organizing and operating community-wide religious events to help the destitute and downtrodden, serve on the fund-raising committee of a local private day school to help raise scholarships for the underprivileged and single parent households . . . (Emphasis added).

The service of the Porros truly seems endless. Les Plosia states that he shared in a variety of community service projects, including: buying and converting St. Joseph's Roman Catholic Church's defunct parochial school into St. Joseph's Playground Park; the Uhland Street Park; the River Renaissance condemnation of a junk yard and defunct tank

farm; the Passaic River Sesselman Veteran's Park; and the Herman Street Firehouse. Robert Piekarz, who created and ran a number of successful businesses in the Bergen-Passaic County area, has known Alfred Porro for thirty years. He writes:

> Alfred was particularly generous of himself and his time when it came to the elderly. Many of his elderly clients have told me of his dedication and of his generous assistance to them. . .

Jack Winand has resided in East Rutherford for the last 48 years. He served as Chief of the East Rutherford Fire Department and Emergency Squad. Having known the Defendants for almost 30 years, he confirms their community service and recounts how they have personally impacted his family:

> Their faith in God has helped many people including myself and my entire family. *They saved my son's life by leading him to a new dedicated faith in God.* This is important because my son had a lot of problems with his family and a problem with drug addiction. My son is now clean for 2 years and a big reason for this success is of the work of Mr. & Mrs. Porro. *They did not give up on him and stuck with him instead of giving up on him* (Emphasis added).

Chief Winand's son, James, tells a similar story:

> When my father had a stroke, Mr. & Mrs. Porro were there to support the family through faith and knowledge and helped the family get through the crisis.
>
> . . . Approximately 6 years ago, I was jobless and financially broke. Mr. & Mrs. Porro reached out to me and helped me find a job. They taught me faith and how to get my feet back on the ground. After failing them by getting caught up with a drug and alcohol problem, Mr.

& Mrs. Porro picked me up and encouraged me. *They never gave up on me. They led me to a new faith in God* (Emphasis added).

Guideline Section 5K1.11 states that charitable and similar prior goods works are not ordinarily relevant to the guidelines calculation, and thus can only serve as a basis for downward departure when present to an exceptional degree or one differing from the ordinary case. The foregoing record of good works clearly eclipses that found in *United States v. Rioux*, 97 F.3d at 648, 652 (2nd Cir. 1996), where the defendant received a ten-level downward departure in large part for fund-raising efforts on behalf of the Kidney Foundation. While not seeking to diminish defendant Rioux's charitable endeavors, the efforts documented in his case are but a fraction of the Porros' philanthropic history. Under the undisputed facts of this case, a substantial downward departure is appropriate.

D) Extraordinary Family Responsibilities and Circumstances

While Guidelines § 5H1.6 discourages departures based on a defendant's family responsibilities, it does not prohibit such departures. Rather, it "restricts them to cases where the circumstances are extraordinary." *U.S. v. Gaskill*, 991 F.2d at 85. In Gaskill, the Third Circuit suggested several factors that district judges should consider when contemplating a departure for extraordinary family circumstances. These include "the value of the departure (i.e., whether the court can legitimately depart to a degree that creates a meaningful benefit)," whether or not the defendant is a beneficial influence, and whether or not the defendant has been convicted of a crime of violence (i.e., poses a threat to the community). *Id., see United States v. Lopez*, Crm. No. 97-611-3 (E.D.Pa. November 12, 1998) (citation omitted). The ties and responsibilities the Porros share with their respective

mothers are clearly deserving of a downward departure. *United States v. Sclamo*, 997 F.2d 970 (1st Cir. 1993) (seven-level departure affirmed for drug defendant who had developed a "crucially important" relationship with the son of his girlfriend, who was suffering from "attention deficit hyperactivity disorder," during the three years he lived in the home).

As noted above, Theresa Atkins, age 76, has suffered from Alzheimer's Disease for over ten years. For the past three years, she has lived her life in the fetal position, no longer speaking or moving. Her 79-year-old husband, John, is her primary caregiver. He writes:

> My wife Theresa, cannot write to you in that she is afflicted with Alzheimer's disease. She cannot speak any more and has been confined to bed for about 3 years. She can no longer feed or clothe herself. I feed her with a syringe and care for her at home. This is becoming more difficult because of my age. It has been a terrible hardship to not be able to see my daughter because I can't go to see her and she has not been allowed to visit us for over four months. I know that this has been a tremendous punishment for Joan as well as Al. They have always been there for us. . . . This has been very hard for all of us.

Due to advancing age, Mr. Atkins finds it increasingly difficult to bear the burden of his wife's constant care alone. Although Joan is one of four sisters, the reality is that her oldest sister, Lorraine, lives in New Hampshire and 'her youngest sister, Barbara, who lives in Lodi, is struggling to overcome a heroin addiction. This leaves Joan and Alfred and Joan's sister, Theresa. However, as Joan describes in her letter to the Court:

I was the only person that he would leave her with so that he could get a break and go out for a few hours and once, for the day, with my sister Teri. Now (that I am under house arrest) he doesn't have that option and gets no relief. He will not leave my mother in anyone else's care. I am the only one he trusted with her. He still, for all these months that I have had home detention, has remained unwilling to let anyone else stay with her alone, not even my daughter Amanda who has an extremely close relationship with him. . . My Dad is suffering tremendously in what should have been the golden years of his life.

John Atkins beseeches the Court to consider leniency for his daughter and son-in-law:

> I ask you to be a man with a great heart and take into consideration the life-long dedication they have with their family, friends, church, and the community. . . . I believe that whatever has happened to them will be a great lesson for them to remember for the rest of their lives. Good people make mistakes and wrong decisions. . . . I am an elderly man who does not have much more earthly time left with my children. I fear that my daughter and son will be taken away from me for my remaining years.

Alfred's mother, Nancy, age 86, also relies heavily on the Porros for assistance. As their daughter Amanda, herself in college and dependent on her parents, describes:

> Never have I seen two people give so much of themselves without ever expecting anything in return. My mom and dad give new meaning to the word humanitarian.
>
> . . . I also ask you to consider my grandparents in your decision. My maternal grandmother is in the late stages of Alzheimer's Disease and is bedridden. My

> grandfather relies on my mother's help in her care. . . It is hard enough for my mom that her mother is ill, but to not be able to see her mother in her last days would be heartbreaking for my mom. In addition to this, my paternal grandmother, though not ill, is in her late eighties and may also be near her last days. To take my parents away from their own parents prematurely is severe. I simply ask that you have a heart in this distressing situation.

Finally, Keith Porro, a young father, recently divorced, describes the plight of his children who live with him four days each week at the home of Al and Joan Porro, he has stated:

> It was a great comfort to me and still is to know that my Dad and Joan are there for my children. They would be crushed if their grandparents were taken away from them. They have been through so much these past two years and their safe place has always been with Dad and Joan. I can't imagine how heartbroken my children would be without them. Dad and Joan are the only grandparents that they have. Please consider the impact that it would have on us as a family and most importantly for the grandchildren to lose both of their grandparents for any period of time.

E) Aggregation of Factors

Clearly the above-mentioned factors, standing alone, justify a significant downward departure in the Defendants' respective cases. Even if the Court were to find that these factors do not independently warrant a departure, it should still grant a departure based on the factors taken in combination. *See Rioux*, 97 F.3d at 663 (affirming a ten-level departure based on defendant's physical condition and prior good works). According to U.S.S.G. § 5K2.0's Commentary:

> The Commission does not foreclose the possibility of an extraordinary case that, because of a combination of such characteristics or circumstances, differs significantly from the 'heartland' cases covered by the guidelines in a way that is important to the statutory purposes of sentencing, even though none of the characteristics or circumstances individually distinguishes the case.

See also Koon, 116 S. Ct. at 2035 (Stevens, J., concurring in part and dissenting in part) ("I do not understand the [majority] opinion to foreclose the District Court from basing a downward departure on a aggregation of factors each of which might in itself be insufficient to justify a departure").

Here the Court would be well within its discretion to grant Alfred and Joan Porro a substantial downward departure based on the preceding combination of factors.

VI. COMMUNITY REACTION

The following are highlighted portions from the outpouring of letters that NCIA believes typify the reaction of those who have known and worked with the Porros for the past decades. Janet Porro, the Defendant's daughter, writes:

> Joan and by Dad are individuals who would never intentionally harm or deceive anyone. I am not asking for forgiveness or absolution, but merely to reflect upon who these two individuals really are, as people.

Theresa Sproviero, Joan Porro's older sister, worked for the Porro law firm for many years and closely with Alfred Porro:

> Through all the years I've worked for and with Al Porro I have always known him to be kind, considerate, generous, compassionate, honest, trustworthy and a

> genuinely fine human being. He is still the same good person I met 25 years ago.
>
> . . . I have always known Joan to be a good person, kind, loving, compassionate, dedicated, honorable, trustworthy and loyal. . . . On a professional level I know her to be the same person but in a professional atmosphere, Joan has always been dedicated and loyal to her clients. . . . I have the same professional admiration for Joan as I do for Al. She too has always worked a 14-16 hour day.
>
> . . . I know that Joan and Al are two genuinely good, fine human beings. I cannot show you on paper all the years of sacrifice, all the years of hard work, all the hours and years of dedication, love and loyalty to their family, their clients, their community and their church as well as all of the accomplishments they made in their life. . . . They have always given to others and asked nothing or little in return.

Mr. Buzak believes that while he can not fully comprehend the scope of the Defendants' convictions, any inappropriate behavior is an aberration to their true character deserving of due consideration:

> I cannot explain or rationalize the acts for which Joan and Al have been convicted. Such analysis will have to be left to others more knowledgeable than I. However, I do know that an incident of illicit conduct should not nullify all of the good and positive things that a person has done in his lifetime. Contributions that have been made to human society and the practice in this profession remain even after these improper acts are committed. It is appropriate to weigh all of these factors in attempting to arrive at a just and fair sentence.
>
> . . . I would ask that the Court not overlook the positive contributions that Al has made to the profession and the public sector field over the years. He has been a

> significant contributor to the state of authority law and has helped authorities to navigate a continuing greater complexity of regulatory controls. He has educated countless commissioners and professionals on a volunteer basis without any compensation through the AANJ and through its successor, the AEA. . . . [T]he totality of the person should be considered and while not diminishing the seriousness of the convictions, the positive contributions that people have made to society and to their profession should not simply be obviated by a singular criminal act.

Vincent Gardella shares Mr. Buzak's sentiment:

> I find their behavior in this matter out of character with my knowledge of them over a very long period of time. They have always had an outstanding work ethic and a strong commitment to their clients and family.

Domenick Giancaspro, Chief Financial Officer and Treasurer Borough of the Carlstadt, provides more direct examples:

> They were always trying to help us at the Borough Hall and did everything they could to make all of our jobs more pleasant and our work product more efficient. . . . They are extremely hard working people who truly care about others.
>
> . . . Even if the Porros did everything that they were found guilty of they are still my friends and people that I respect. *You can't just forget about the years of doing good for people, the kindness and generous giving of their time and talents to others.* They have both been an asset to Carlstadt and the neighboring community, East Rutherford.
>
> I am asking that you consider all the good that the Porros have done over the years in arriving at sentences for

them. They have helped so many people and have had a positive impact on so many lives (Emphasis added).

Others, like Dr. Matriss, simply ask for leniency:

I hope that these two fine family people, Al and Joan Porro, who have made great contributions to the community, be given consideration for leniency in the application of the sentencing.

Rev. Czubowski:

I ask that the court would entertain and consider their punishment to be focused on serving their sentence out in adding value to the community rather than incarceration. Their talents could serve the community well and help in reversing the deterioration taking place in cities of New Jersey.

John Palmisano:

I am witness to Al's fervent and genuine faith in his God as of forty-four years ago. . . . I vividly recall that prior to classes in law school, virtually each day Al would faithfully attend morning mass at the Catholic Church down the street from the school.

. . . I feel comfortable in respectfully requesting Your Honor for leniency in Your sentencing, since I know that the personal and professional stigma that Al will carry over the balance of the twilight years of his life will be the severest of his punishment.

Robert Piekarz:

The conduct that was alleged against them is completely out of character for the individuals that I know and trust. . . . I assure you that they are not representative of the true character of two very good and decent persons. At

> worst, you have before you two good people who for a short time lost their way. If any people were ever deserving of kindness and leniency, these are two.

Howard L. Alderman, Jr., managing partner of a Maryland law firm and has known the Defendants for more than seventeen years:

> Apparently, the Porros have erred; however, if the Court finds that any such errors were the result of poor judgment that is otherwise out of character with the lives that these two individuals had led outside of their present difficulties, I would encourage the Court to impose sanctions that will send the appropriate message. Those sanctions, punitive to the degree necessary, should, at the same time incorporate the talents that the Porros have shown over the years in their service to their community.
>
> . . . Although I will be out of the State on vacation with my family during that entire week of August [when sentencing will occur], I am willing to be present at that hearing if it would be helpful to the Court. . . . I would ask the Court to look beyond the rules and statutes and look into the lives of the Porros. I believe that the Court will find two quality, respectable individuals who apparently came to that proverbial fork in the road and went the wrong way. I believe that appropriate sanctions should incorporate the years of dedication to family, church and colleagues and community involvement that the Porros have demonstrated over the years.

VII. RECOMMENDATION

Alfred and Joan Porro present the Court with two compelling histories that individually and collectively remove their respective cases far from the heartland of money laundering offenses envisioned by the drafters of the Federal

Sentencing Guidelines. Taken together with their uncontested record of prior good works, their responsibilities to their elderly parents and grandchildren, and the question of loss to any of the victims, consideration of the totality of the Porros' lives mandates significant downward departures. Although these are both first-time offenders and respected community members, who pose no risk to public safety, NCIA ultimately understands and appreciates that the Court might consider imposing a period of incarceration, albeit brief, under the current Guidelines' framework. In that instance however, we would respectfully request that the Court instead consider a community-based term for each Defendant combining probation supervision with community confinement or home detention and substantial community service. Such a sentence would be most appropriate under the circumstances of this case satisfying both the statutory purposes of sentencing and the existing mitigating factors.

Appendix A

NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES

The National Center on Institutions and Alternatives (NCIA) has operated since 1977 as a 501(c)(3) corporation. The organization is a major national provider in the field of private correctional services. Operations include sentencing services to courts and attorneys, secure units for juvenile offenders and residential living units for offenders with special needs.

NCIA also provides master planning and needs assessment to state and local governments facing institutional overcrowding; mental health counseling to adult and adolescent sex offenders and their families analysis of pretrial, early release, and intensive supervision programs and policies; and, research and consultation on jail suicide and suicide prevention. Other services include a state-of-the-art program to monitor offenders on home detention, a family preservation initiative, and training.

PROGRAMS AND SERVICES

Professional Sentencing Services—Since 1979, NCIA has been the industry leader in providing alternative sentencing and post-conviction services to defense attorneys and courts. Under the trademark "Client Specific Planning" (CSP), the Center developed and refined a service which provides client-based information and specific, creative programs for clients and their attorneys for use at sentencing and parole hearings. NCIA has prepared over 10,000 individual cases for 75 of the 95 Federal District Courts and to state and county courts in all 50 states, plus the District of Columbia. NCIA also provides an array of mitigation services in capital cases.

Public Policy Research and Analysis—NCIA maintains a staff of researchers and public policy analysts to study current criminal and juvenile justice trends and issues and to propose effective, alternative public policy for consideration by elected officials. Currently NCIA is sponsoring the Coalition for Federal Sentencing Reform, a project to review the ten-year experiment with the federal sentencing guidelines to see if they are accomplishing the goals set by Congress, and to propose needed reforms. Prior to this, NCIA sponsored the National Criminal Justice Commission, that issued a report in 1996 entitled *The Real War on Crime*, published by HarperCollins.

Alternative Living Units—Over the past four years, NCIA has developed and implemented a unique residential program for developmentally disabled offenders. Alternative Living Units (ALUs) are apartments rented in residential complexes which are staffed with 24-hour/day awake supervision and supported by professional service provides during daytime hours.

Mental Health Counseling—The Augustus Institute, a mental health project of NCIA, under the clinical direction of Dr. Jerome G. Miller, has been offering assessment and treatment of individuals with sexual disorders, compulsions and paraphilias since 1987. Through its professional staff of clinical social workers, psychologists and psychiatrists, The Augustus Institute provides psychosocial evaluations and therapy for both adolescents and adults, families and victims of sexual abuse. Services include psychological testing and penile plethysmograph assessments, individual therapy, group therapy, family treatment and case management. Other outpatient services include violent, aggressive and assaultive behavior therapy, domestic violence counseling, and sexual abuse victims therapy. Dr. Miller is a

psychiatric social worker with more than 30 years of clinical experience.

Jail Suicide Prevention—Since 1986, in partnership with the National Institute of Corrections, NCIA has acted as the National Coordinator of the Jail Suicide Prevention Task Force. The project conducts jail suicide prevention seminars; provides technical assistance materials to state officials and individual jail facilities; and, disseminates a quarterly newsletter (*Jail Suicide Update*). The project has developed a training curriculum on suicide prevention in jails and collects data from county jails, city jails and police lockups in the incidence of suicides.

APPENDIX I

NATIONAL CENTER ON INSTITUTIONS AND ALTERNATIVES

JEROME G. MILLER
President
HERBERT J. HOELTER
Director

CONFIDENTIAL

October 5, 1999

VIA AIRBORNE EXPRESS

The Honorable Joseph H. Rodriguez
United States District Court for the
District of New Jersey
Mitchell H. Cohen U.S. Courthouse
John F. Gerry Plaza, Room 6060
Post Office Box 886
Camden, New Jersey 08101

RE: *United States v. Alfred & Joan Porro*
Docket Nos. 98-00420-001, 002

Dear Judge Rodriguez:

At the request of Alfred and Joan Porro, the National Center on Institutions and Alternatives (NCIA) submits the following letter to supplement our earlier report concerning the Porros' pending sentencing. As Your Honor is aware, the NCLA report was intended to provide the Court detailed background information about the Porros as well as to address areas of mitigation uncovered in the course of our investigations. It was not a report designed to offer in-depth analysis of the Federal Sentencing Guidelines, with the exception of the atypical money laundering discussion. The purpose of this letter, however, is to look more intently at the

Guidelines as *re-applied* by the Probation Office and to reemphasize the unique nature and character of Alfred and Joan Porro.

PRESENTENCE REPORTS

Let me begin by expressing my continued dismay regarding the Probation Office's ongoing interactions with the United States Attorney's Office. On page 13 of NCIA's sentencing report, I noted my concern that the Porros' original Presentence Reports (PSIs) were a "a verbatim recitation of the factual allegations in the government's Sentencing Memorandum," which, at least superficially, suggested potential bias in the Probation Office's findings. As an agent of the Court, the Probation Office's unyielding autonomy is of utmost importance during the post-conviction. pre-sentence investigation stage of a federal criminal case:

> A primary role of the probation officer is to prepare a presentence report of the highest quality for that court that will assist in sentencing a defendant. *Under guideline sentencing the probation officer's role as the Court's independent investigator is critical* . . . (emphasis added).[1]

Despite these governing standards and our expressed concerns, the Porros' new PSLs seem to reflect the Probation Office's continuing, blind acquiescence of the government's rendition of events so that the United States Attorney's Office might achieve its desired results: lengthy prison terms for both Alfred and Joan Porro. The "revised" PSIs contain a re-calculation of the Guidelines, wherein the Porro's total offense levels remain relatively unchanged even though the money laundering guideline, and its associated *high* base offense level, is not employed. Mr. Porro's new total offense

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[1] Administrative Office of the Courts, *The Presentence Investigation Report—Publication 107: for Defendants Sentenced Under the Sentencing Reform Act of 1984*, F-3 (1992).

level is 27 versus the original 29, while Mrs. Porro's has lowered four levels to 25. The mere appearance of partiality serves only to taint the administration of justice. Here, it would seem the Probation Office has surpassed mere appearances.

A) Culpability Distinctions

The most obvious problem NCIA found with the Porros' PSIs is the Probation Office's failure to distinguish their respective actions. For instance, Joan Porro was not charged or convicted of counts 6 to 14, yet paragraphs 35 to 42 of her PSI provide substantial information about these counts. Likewise, paragraph 34 of Mrs. Porro's PSI details false statements *her husband* purportedly made to federal agents. The inclusion of this information unquestionably prejudices the presentation of Joan Porro's case to the Court.

There similar problems with Alfred Porro's PSI. Most notably, he had no relationship with Richard and Bradley Galofaro and, thus, never violated their trust. As his use of the Galofaro funds did not involve a special skill, a two-level enhancement pursuant to § 3B1.3 is unwarranted.

B) Grouping-Alfred Porro

NCIA also believes that the grouping employed by the Probation Office in Alfred Porro's PSI is erroneous as it fails to properly account for the separate and distinct nature of the mail fraud and loan application/false statement counts. Guideline § 3D1.2 prescribes the four circumstances under which "closely related counts" may be grouped:

(a) counts involving a single victim and a single incident,

(b) counts involving a single victim and connected incidents,

(c) offenses in which one count is also a specific offense characteristic of another count, and

(d) offenses where guidelines are based primarily on quantity or contemplate continuing conduct.

United States v. Rudolph, 137 F.3d 173 (3d Cir. 1998) (the general principle underlying grouping is that "all counts involving the same harm shall be grouped together in a single group") (citation omitted).

Here, the mail fraud and false statement counts do not involve the same victim or a common scheme or plan. While both sets of counts admittedly are to be considered under the fraud guideline (§ 2F1.1), they are not factually linked and occurred at different times and in different places. *United States v. Seligsohn*, 981 F.2d 1418 (3d Cir. 1992) (". . . although all of the counts [mail fraud, bribery and tax evasion] are listed in subsection (d) as appropriate for grouping, that inclusion does not mean that the counts must be grouped") (citation omitted); *see United States v. Ketcham*, 80 F.3d 789 (3d Cir. 1996) (finding that § 3D1.2(d) "is intended to require grouping where the offense conduct is *ongoing or continuous* . . . ") (emphasis added). Thus, NCIA would offer that a correct interpretation of Mr. Porro's Guidelines requires that mail fraud and false statement counts be grouped separately.

C) Loss

As the Court is no doubt familiar, valuation of loss for purposes of determining a §2F1.l(b)(1) enhancement is a frequently contested matter in fraud cases. Fortunately, the Guidelines provide some guidance for offenses, such as Alfred Porro's, that involve false financial statements. As set forth § 2F1.1, Application Note 7(b)[2]:

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[2] It should be noted that Application Note 7 became Application Note 8 in this most recent amendment cycle (November 1, 1998).

> In fraudulent loan application cases . . . the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan . . . (emphasis added).

The Third Circuit first reviewed the above language as *dicta* in *United States v. Kopp*, 951 F.2d 521 (3d Cir. 1991) (Guideline Amendment 393, from which Application Note 7(b) is derived, was enacted subsequent to defendant's sentencing but confirmed appellate panel's analysis of pre-amendment Guidelines and case law). There, the appellate panel enunciated what has become the standard measure of loss for fraud cases in the Third Circuit, particularly those involving a false statement(s) on a loan application: actual loss to the victim: ". . . where, as here, the defendant fraudulently misstates his assets, the 'loss' is the victim's actual loss—unpaid principal and interest less the amount the lender has recovered (or can expect to recover) from the loan collateral." *Id.* The Court went on to hold that:

> . . . fraud "loss" is, in the first instance, the amount of money the victim has actually lost (estimated at the time of sentencing), *not* the potential loss as measured at the time of the crime. However, the "loss" should be revised upward to the loss that the defendant intended to inflict, if that amount is high than the actual loss.

Id. (emphasis added).

This standard has been consistently affirmed over the ensuing years:

> In applying this *flexible, fact-driven concept of loss*, we have thus held that in situations . . . where value passes

> in both directions . . . the victim's loss will normally be the difference between the value he or she gave up and the value he or she received (or, if greater, the difference between what the perpetrator intended to give up and to receive).

United States v. Dickler, 64 F.3d 818 (3d Cir. 1995) (emphasis added), *United States v. Nathan*. No. 98-6262 (3d Cir. Aug. 18, 1999) ("We have repeatedly emphasized that the amount of loss in a fraud case, unlike that in a theft case, often depends on the actual value received by the defrauded victim.").

While taking no position as to a final loss figure in this case, NCLA would point out that the majority of victims indentified by the Probation Office have received full or significant restitution from the Porros since authorities first approached them. The Galofaro boys' trust was paid not only the $276,000 taken from their trust account, but also an additional $150,000 in interest. At a minimum, the Porros' efforts to make restitution seem to indicate the loss figures set forth in their respective PSIs may overstate the seriousness of their conduct and, thus, a downward departure from their respective guideline ranges may be warranted. *See* § 2F1.1, Application Note 7(b) (1994 ed.).

FACTORS IN MITIGATION

In closing, please allow me to convey to the Court NCIA's concern that what is lost in the debate about loss valuations and offense groupings is that Al and Joan Porro are fundamentally decent, well-respected individuals, who, despite their involvement in the instant matter, have contributed greatly to their community and respective families for many years. Although issues relating to analysis of the Sentencing Guidelines and computation of an accurate total offense level are vital to the sentencing process, it is equally important to remember what is at stake: the lives and

liberties of two individuals upon whom many people rely greatly.

The outpouring of community support evidenced through the voluminous amount of letters written on the Porros' behalf perhaps best exemplify the high regard in which they are held. Following the original submission of letters, more than a dozen new letters were received, each citing Alfred and Joan Porro's many positive contributions, expressing unwavering support, and requesting the Court's leniency at sentencing. For instance, Susan Mercoun, a longtime friend, writes:

> (The Porros) go out of their way to help others in need. As far back as I can remember, Joan and Al have always been involved in town activities, either helping out or just by being there, whether it be a parade in town, a little league game or any other town function.
>
> I have had the opportunity to observe Joan and Al with their family. You can see the love pour out of them when they're with their children and grandchildren. They are a devoted loving couple who is devoted to their family.

Michael Raimo, a trustee of the North Ward Citizens Committee, speaks of the Porros' dedication to the disadvantaged and asks for leniency:

> I have known the Porro's for the last 35 years in a personal, professional, and family way. On numerous occasions I have called upon the Porro's to assist people in need both legally and personally who in no way could ever afford the kind of legal representation supplied to them by lawyers of this quality. They have always extended themselves with total commitment and diligence and any time the Porro's were needed in a community based problem they were the first to show up . . . I appeal to Your Honor on the basis of this couples life who have worked diligently professionally while

> committed to their community and family and have always demonstrated their honesty and responsibility to all people in need . . .
>
> I would hope that in Al and Joan's time of sentencing before you. I can ask you to consider their whole life so that there may be leniency granted to them. I have complete faith in these people and I hope that this court also will.

These two letters, along with the more than 100 submitted to the Court, elucidate certain unmistakable themes in the defendants' lives: commitment to community service and the disadvantaged, respect within the legal and academic worlds, devotion to God, and dedication to family and friends, but to name a few. NCIA sought to more fully develop these themes in our sentencing report so that the Court might better understand Alfred and Joan Porro outside the government's trial presentation. While not wishing to reiterate the points raised in our report and in the submitted package of letters, it should be stated that Joan Porro's father recently fractured a vertebrae in his back, thereby restricting his movement. As he is the primary caretaker of Joan's mother, who suffers from Alzheimer's Disease, it seems that Joan's family responsibilities are all the more atypical and may, at the Court's discretion, merit a downward departure from her recommended guideline range.

Ultimately, Alfred and Joan Porro are first-time offenders and respected community members, who pose no risk to public safety. Should the Court elect to depart downwardly from their guidelines to an offense level that permits placement in the community, NCIA believes that they can be adequately managed while providing substantial restitution via volunteer service, an option unavailable in prison. A community-based sentence would satisfy both the statutory purposes of sentencing and the existing mitigating factors presented in this case.

I thank the Court for its continued consideration. Should Your Honor have any questions or concerns regarding the preceding information or NCIA's sentencing report please do not hesitate to contact me at (703) 684-0373.

Sincerely,

_____

Joel A. Sickler
Director, Client Services

JAS: ab

cc: Alfred and Joan Porro (via facsimile)
Perry Carbone/Renee Bumb, AUSAs (via airborne express)